DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 10-1542
Title: Eric H. Holder, Jr., Attorney General, Petitioner
v.
Carlos Martinez Gutierrez
Docketed: June 23, 2011
Linked with 10A1012
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (08-70436)
Decision Date: January 24, 2011
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Apr 14 2011	Application (10A1012) to extend the time to file a petition for a writ of certiorari from April 24, 2011 to May 24, 2011, submitted to Justice Kennedy.
Apr 18 2011	Application (10A1012) granted by Justice Kennedy extending the time to file until May 24, 2011.
May 13 2011	Application (10A1012) to extend further the time to file a petition for a writ of certiorari from May 24, 2011 to June 23, 2011, submitted to Justice Kennedy.
May 17 2011	Application (10A1012) granted by Justice Kennedy extending the time to file until June 23, 2011.
Jun 23 2011	Petition for a writ of certiorari filed. (Response due July 25, 2011)
Jul 13 2011	Order extending time to file response to petition to and including August 24, 2011.
Aug 24 2011	Order further extending time to file response to petition to and including August 25, 2011.
Aug 25 2011	Brief of respondent Carlos Martinez Gutierrez in opposition filed.
Sep 7 2011	DISTRIBUTED for Conference of September 26, 2011.
Sep 8 2011	Reply of petitioner Eric H. Holder, Jr., Attorney General filed. VIDED. (Distributed)
Sep 27 2011	Petition GRANTED the petition for writ of certiorari in No. 10-1543 is granted. The cases are consolidated and a total of one hour is allotted for oral argument. VIDED.
Nov 14 2011	SET FOR ARGUMENT ON Wednesday, January 18, 2012.
Nov 14 2011	Joint appendix filed.
Nov 14 2011	Brief of petitioner Eric H. Holder, Jr., Attorney General filed. VIDED.
Nov 18 2011	CIRCULATED.
Nov 18 2011	Record received from U.S.C.A. for Ninth Circuit. (1 envelope)
Dec 14 2011	Brief of respondent Damien Antonio Sawyers filed. (Distributed)
Dec 14 2011	Brief of respondent Carlos Martinez Gutierrez filed. (Distributed)

Dec 14 2011	Request of counsel for the respondent to lodge copies of documents cited to in his brief on the merits.
Dec 20 2011	Motion for divided argument filed by respondents. VIDED.
Dec 21 2011	Brief amicus curiae of National Immigration Justice Center filed. VIDED. (Distributed)
Jan 6 2012	Motion for divided argument filed by respondents GRANTED. VIDED.
Jan 6 2012	Supplemental brief of respondent Carlos Martinez Gutierrez filed. (Distributed)
Jan 11 2012	Reply of petitioner Eric H. Holder, Jr., Attorney General filed. VIDED. (Distributed)
Jan 18 2012	Argued. For petitioner: Leondra R. Kruger, Assistant to the Solicitor General, Department of Justice, Washington, D. C. For respondent in No. 10-1542: Stephen B. Kinnaird, Washington, D. C. For respondent in No. 10-1543: Charles A. Rothfeld, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

No. 10-1542

In the Supreme Court of the United States

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
PETITIONER

v.

CARLOS MARTINEZ GUTIERREZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a parent's years of lawful permanent resident status can be imputed to an alien who resided with that parent as an unemancipated minor, for the purpose of satisfying 8 U.S.C. 1229b(a)(1)'s requirement that the alien seeking cancellation of removal have "been an alien lawfully admitted for permanent residence for not less than 5 years."

2. Whether a parent's years of residence after lawful admission to the United States can be imputed to an alien who resided with that parent as an unemancipated minor, for the purpose of satisfying 8 U.S.C. 1229b(a)(2)'s requirement that the alien seeking cancellation of removal have "resided in the United States continuously for 7 years after having been admitted in any status."

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In the Supreme Court of the United States

No. 10-1542

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
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v.

CARLOS MARTINEZ GUTIERREZ

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of Attorney General Eric H. Holder, Jr., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-2a) is unreported. The decisions of the Board of Immigration Appeals (App. 5a-6a, 12a-16a) and the immigration judge (App. 7a-9a, 17a-27a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 2011. On April 18, 2011, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including May 24, 2011. On May

17, 2011, Justice Kennedy further extended the time to and including June 23, 2011. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the appendix to this petition. App. 28a-30a.

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, the Attorney General, in his discretion, may cancel the removal of an alien who is found to be removable. 8 U.S.C. 1229b (2006 & Supp. III 2009). The statute sets forth the eligibility criteria for cancellation of removal of a lawful permanent resident alien as follows:

> **(a) Cancellation of removal for certain permanent residents**
>
> The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—
>
> (1) has been an alien lawfully admitted for permanent residence for not less than 5 years,
>
> (2) has resided in the United States continuously for 7 years after having been admitted in any status, and
>
> (3) has not been convicted of any aggravated felony.

8 U.S.C. 1229b(a).

The INA defines the phrase "lawfully admitted for permanent residence," as used in Subsection (a)(1), as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." 8 U.S.C. 1101(a)(20). The INA defines "residence," as used in Subsection (a)(2) ("resided"), as the alien's "principal, actual dwelling place in fact, without regard to intent." 8 U.S.C. 1101(a)(33). And the INA defines "admitted" as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. 1101(a)(13)(A). An alien may be "admitted" to the United States either at a port of entry or by adjusting to a lawful status while already in the country. See, *e.g.*, *In re Alyazji*, 25 I. & N. Dec. 397, 399-400 (B.I.A. 2011).

The cancellation-of-removal statute further provides that an alien's period of continuous residence is deemed to end

> when the alien is served a notice to appear under section 1229(a) of this title, or * * * when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.

8 U.S.C. 1229b(d)(1)(A)-(B).

To obtain cancellation of removal, the alien must demonstrate both that he is statutorily eligible for such relief and that he warrants a favorable exercise of discretion. *In re C-V-T-*, 22 I. & N. Dec. 7, 10 (B.I.A. 1998).

The alien bears the burden of proof on those issues. 8 U.S.C. 1229a(c)(4)(A)(i); 8 C.F.R. 1240.8(d). The ultimate discretion of the Attorney General to grant such relief is akin to "a judge's power to suspend the execution of a sentence, or the President's to pardon a convict." *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996) (citation omitted).

2. a. In 1988 or 1989, at the age of five, respondent, a native and citizen of Mexico, illegally entered the United States and thereafter resided in the United States with his parents. App. 12a, 18a. In 1991, when respondent was seven years old, his father was granted lawful permanent resident (LPR) status. *Ibid.* In October 2003, at the age of 19, respondent obtained LPR status. App. 12a-13a.

b. In December 2005, immigration officials apprehended respondent at the border for alien smuggling and subsequently served and filed a Notice to Appear charging him with being inadmissible on that basis under 8 U.S.C. 1182(a)(6)(E)(i). App. 18a. Respondent admitted to the facts establishing his removability but sought cancellation of removal pursuant to 8 U.S.C. 1229b(a). App. 13a, 19a.

In March 2006, after a merits hearing, an immigration judge (IJ) found respondent statutorily eligible for cancellation of removal, even though he had neither been lawfully admitted for permanent residence for five years (8 U.S.C. 1229b(a)(1)) nor resided in the United States for seven years after lawful admission (8 U.S.C. 1229b(a)(2)). App. 19a-22a. Applying *Cuevas-Gaspar* v. *Gonzales*, 430 F.3d 1013, 1021-1029 (2005), in which the Ninth Circuit held that a parent's period of continuous residence after the parent's lawful admission could be imputed to a minor child residing with the parent for the

purpose of satisfying Section 1229b(a)(2)'s seven-year residency requirement, the IJ permitted respondent to rely on his father's years of lawful residence after his father's 1991 admission to satisfy that requirement. App. 21a-22a.

The IJ further invoked the reasoning of *Cuevas-Gaspar* to permit imputation to respondent of his father's 1991 adjustment to LPR status as well. App. 21a-22a. By virtue of that additional imputation, the IJ found that respondent satisfied Section 1229b(a)(1)'s separate requirement of having been an LPR for five years. App. 22a.[1]

Finally, after weighing the equities of respondent's situation, the IJ granted respondent cancellation of removal in the exercise of discretion.

c. The Board of Immigration Appeals (Board) reversed and remanded for entry of an order of removal. App. 12a-16a.

The Board declined to extend *Cuevas-Gaspar* to permit the use of imputation to satisfy Section 1229b(a)(1)'s requirement that the alien have been lawfully admitted as a permanent resident for five years. App. 13a-14a. The Board distinguished Section 1229b(a) from the statute at issue in *Lepe-Guitron* v. *INS*, 16 F.3d 1021 (9th Cir. 1994), the case that formed the basis for the Ninth Circuit's holding in *Cuevas-Gaspar*. App. 14a-15a. In *Lepe-Guitron*, the Ninth Circuit had considered the term "domicile" as an eligibility requirement under former 8 U.S.C. 1182(c),[2] and had held that a minor child's

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[1] It was undisputed that respondent had not been convicted of any aggravated felony, so the IJ also found that he satisfied 8 U.S.C. 1229b(a)(3). App. 20a.

[2] Section 1182(c), which was repealed in 1996 and replaced by Section 1229b (see Illegal Immigration Reform and Immigrant Responsibility

"domicile" is that of his parents because domicile requires an intent to remain indefinitely and children are not legally capable of forming the necessary intent. App. 14a-15a. The Board explained that the Ninth Circuit's reasoning did not apply to Section 1229b(a)(1)'s five-year LPR status requirement because the period of five years is measured from when the alien was "admitted" as an LPR, and that "admitted" is a term of art under the INA that "does not depend on either the intent or the capacity of the minor, but rather on inspection and authorization by an immigration officer." App. 14a. Accordingly, the Board reasoned that, unlike in *Lepe-Guitron*, "it was unnecessary to look to the respondent's parent to determine intent." App. 15a. "Instead, the critical question was how long had the respondent been lawfully accorded the privilege of residing permanently in the United States as an immigrant." *Ibid.*

Even as to Section 1229b(a)(2), the requirement directly at issue in *Cuevas-Gaspar*, the Board noted that the provision also "contains no domicile requirement,"

Act of 1996, Pub. L. No. 104-208, Div. C, § 304(a)(3) and (b), 110 Stat. 3009-594, 3009-597), provided that:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1) to (25), (30), and (31) of subsection (a) of this section.

8 U.S.C. 1182(c) (1988). Courts interpreted that provision to allow for a discretionary waiver of deportation to deportable aliens who were permanent residents and had accrued seven years of "lawful unrelinquished domicile" in the United States. See, *e.g.*, *Lepe-Guitron*, 16 F.3d at 1023; see also *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001) (explaining that Section 1182(c) was extended to deportable aliens).

but rather "requires residence, which contains no element of subjective intent." App. 15a. The Board further concluded that to allow imputation of a parent's status and residence to meet both the first and second prongs of Section 1229b(a) "would essentially destroy the distinct tests mandated by Congress." *Ibid.*

d. On remand, the IJ entered a removal order. App. 7a-9a. Respondent appealed, and the Board reaffirmed its prior disposition. App. 5a-6a. The Board cited its then-recent precedential decision in *In re Escobar*, 24 I. & N. Dec. 231 (2007), in which the Board noted its disagreement with *Cuevas-Gaspar* and elaborated on its reasoning for not extending *Cuevas- Gaspar*'s imputation rationale to Section 1229b(a)(1)'s five-year LPR status requirement. App. 6a.

e. Subsequently, in *In re Ramirez-Vargas*, 24 I. & N. Dec. 599 (2008), the Board rejected an alien's invocation of imputation in attempting to satisfy Section 1229b(a)(2)'s seven-year continuous residence requirement. Notwithstanding *Cuevas-Gaspar*'s contrary holding, the Board reasoned that the Ninth Circuit was required to defer to the Board's intervening decisions in *Ramirez-Vargas* and *Escobar* pursuant to *National Cable & Telecommunications Ass'n* v. *Brand X Internet Services*, 545 U.S. 967 (2005). See 24 I. & N. Dec. at 600-601.

3. The Ninth Circuit granted respondent's petition for review and remanded to the Board for reconsideration of his cancellation-of-removal application in light of the Ninth Circuit's intervening decision in *Mercado-Zazueta* v. *Holder*, 580 F.3d 1102 (2009). App. 2a. In *Mercado-Zazueta*, the Ninth Circuit rejected the Board's decisions in *Ramirez-Vargas* and *Escobar* and treated *Cuevas-Gaspar*'s holding as binding with res-

pect to Section 1229b(a)(2). See 580 F.3d at 1115. The Ninth Circuit also extended *Cuevas-Gaspar* to Section 1229b(a)(1), holding that "for purposes of satisfying the five years of lawful permanent residence required under [Section 1229b(a)(1)], a parent's status as a lawful permanent resident is imputed to the unemancipated minor children residing with that parent." *Id.* at 1113.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit is the only court of appeals that permits imputation to an alien of a parent's lawful admission date, years of residence after that admission, and period of having been lawfully admitted for permanent residence, for purposes of enabling the alien to satisfy the statutory criteria for cancellation of removal. Invoking *Mercado-Zazueta* v. *Holder*, 580 F.3d 1102 (9th Cir. 2009), which in turn relied on *Cuevas-Gaspar* v. *Gonzales*, 430 F.3d 1013 (9th Cir. 2005), the Ninth Circuit granted the petition for review in this case challenging the Board of Immigration Appeals' determination that respondent was ineligible for cancellation of removal. The Ninth Circuit did so notwithstanding that respondent had neither "been an alien lawfully admitted for permanent residence for not less than 5 years" (8 U.S.C. 1229b(a)(1)) nor "resided in the United States continuously for 7 years after having been admitted in any status" (8 U.S.C. 1229b(a)(2)). That decision, and the Ninth Circuit precedents on which it is based, are ripe for this Court's review.

First, the Ninth Circuit's imputation rule is erroneous. Nothing in Section 1229b(a)'s text or legislative history suggests that an alien may rely on a parent's admission, residence, or LPR status to satisfy the statutory requirements that the alien have a certain period of

LPR status and residence after admission in order to qualify for cancellation of removal. To the contrary, the statute's plain language makes clear that only the alien's *own* period of LPR status and residence after admission are relevant for purposes of Section 1229b(a)(1) and (2). Even if the lack of any statutory basis for imputation somehow rendered Section 1229b(a) ambiguous, the Board's precedential interpretations of the statute as not permitting imputation are reasonable and thus entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984).

Second, the Ninth Circuit's imputation rule conflicts with the holdings of two other courts of appeals and the considered view of a third court of appeals—all of which have expressly rejected the Ninth Circuit's position. See *Deus* v. *Holder*, 591 F.3d 807, 811 (5th Cir. 2009); *Augustin* v. *Attorney Gen. of the U.S.*, 520 F.3d 264, 269 (3d Cir. 2008); see also *Cervantes* v. *Holder*, 597 F.3d 229, 236 (4th Cir. 2010) (in dicta).

Third, because almost half of all cancellation-of-removal applications are filed within the Ninth Circuit, the practical consequences of the Ninth Circuit's aberrant imputation rule are significant. Not only does the rule preclude uniform administration of the immigration laws, but it also impedes the government's high-priority efforts to remove criminal aliens.

A. The Ninth Circuit's Imputation Rule Is Incorrect

1. The plain language and purpose of Section 1229b(a) dictate that the decisionmaker must look only to the status, residency, and admission of the alien, not anyone else, for purposes of establishing the alien's eligibility for cancellation of removal. The Ninth Circuit decisions allowing an alien to rely on a parent's status,

residency, and admission date to satisfy the requirements of Section 1229b(a)(1) and (2) cannot be reconciled with the statutory text or purpose.

a. Section 1229b(a)(2), the provision at issue in *Cuevas-Gaspar*, requires as an element of eligibility for cancellation of an alien's removal that "the alien * * * has resided in the United States continuously for 7 years after having been admitted in any status." That text forecloses the Ninth Circuit's imputation rule. First, by specifying that "*the* alien" whose removal is at issue must have resided in the United States for seven years after having been admitted, the statute leaves no room to impute to the alien the admission date or residency period of anyone else (including the alien's parent). The Ninth Circuit has failed to grapple with that basic textual point.

Second, and relatedly, the phrase "after having been admitted" reinforces the conclusion that Section 1229b(a)(2) refers to the alien's own admission rather than the admission of any other individual. That reading is supported by the INA's definition of the term "admitted," which is, "with respect to an alien, the lawful entry of *the* alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. 1101(a)(13)(A) (emphasis added). In other words, an alien's status as "admitted" is to be determined solely by reference to the alien's *own* lawful entry, after official inspection and authorization. The admission of anyone else, including the alien's parent, is irrelevant.

Third, the INA provides that the "term 'residence' means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent." 8 U.S.C. 1101(a)(33). The definition's use of the possessive pro-

noun "his" evinces that the term "residence"—and hence the term "resided" in Section 1229b(a)(2)—denotes the alien's own residence, and not the residence of anyone else. Moreover, the definition's reference to the "principal, actual dwelling place in fact, without regard to intent," expressly precludes any reliance on intent—which, by contrast, is relevant to determining an alien's domicile (see pp. 15-16, *infra*). For that reason, regardless of whether a minor alien is capable of forming a legally sufficient intent to establish *domicile*, there is no basis to consider a parent's intent with respect to the minor's actual *residence*. Accordingly, the use of the term "resided" in Section 1229b(a)(2) buttresses the conclusion that only the actions and physical location of the alien himself have relevance in establishing statutory eligibility for cancellation of removal.

b. Section 1229b(a)(1), the other eligibility requirement at issue in this case, requires that "the alien * * * has been an alien lawfully admitted for permanent residence for not less than 5 years." By referring to the lawful permanent residence of "*the* alien" subject to removal, Section 1229b(a)(1), like Section 1229b(a)(2), makes clear that the alien seeking cancellation must *personally* satisfy the specified requirement. Moreover, the phrase "lawfully admitted for permanent residence" is defined by the INA to mean "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." 8 U.S.C. 1101(a)(20). Because "status" is an attribute personal to the alien, the statutory focus on that term reinforces the conclusion that eligibility for cancellation turns on whether and when the government has affirmatively accorded the alien himself the privilege of residing

permanently in the United States. The actions and status of others, including the alien's parents, are irrelevant for those purposes.

By contrast, there is no reading of Section 1229b(a)(1)'s text that supports the Ninth Circuit's conclusion that *the alien's* admission for lawful permanent residence for five years can be equated with the alien's *parent's* admission for lawful permanent residence for five years. Indeed, under the Ninth Circuit's view, even an alien who was never granted LPR status might be eligible for cancellation of removal under Section 1229b(a) based on a parent's LPR status—contradicting the very title of that provision ("Cancellation of removal for certain permanent residents"). Cf. *Mercado-Zazueta*, 580 F.3d at 1110 n.9 (reserving question).

c. Nor is there any indication in the legislative history that Congress intended that an alien be allowed to impute another person's status or residency to satisfy either requirement of Section 1229b(a). Lacking any such evidence, the Ninth Circuit relied on what it perceived to be a generalized congressional preference for keeping LPR parents and their minor children together. See *Cuevas-Gaspar*, 430 F.3d at 1024; see also *Mercado-Zazueta*, 580 F.3d at 1105-1106. But there is no reason to believe that Congress intended that general principle to trump Section 1229b(a)'s express requirement that the alien himself meet certain minimum criteria to qualify for cancellation of removal, even if the alien's parent should meet those criteria.

Indeed, respondent, after all, was not granted LPR status in his own right until 2003 when he was no longer a minor, and he then was apprehended and placed in removal proceedings for alien smuggling in December 2005. Respondent thus sought cancellation of removal

as an adult, not as a minor child seeking to remain in the United States with a parent.

To the extent that a legislative purpose can be discerned from the structure of the statute, that purpose is at odds with an interpretation permitting imputation. That Congress specified separate subsections with distinct requirements reflects Congress's insistence that the alien seeking cancellation of removal must meet precise standards, and not be allowed to qualify through a form of substantial compliance or by resort to equitable theories. Moreover, the Ninth Circuit's interpretation conflicts with other relevant sections of the INA—a result that Congress would not have intended. For example, 8 U.S.C. 1229b(d)(1) provides that an alien's period of continuous residence after admission stops accruing for purposes of cancellation relief when that alien has committed a crime that renders him inadmissible. Allowing an alien subject to that limitation to circumvent it by imputing a parent's admission and residence would render Section 1229b(d)(1) meaningless as applied to such aliens. Additionally, 8 U.S.C. 1227(a)(2)(A)(i)(I) provides that an alien convicted of a crime involving moral turpitude committed within five years of admission is deportable. Under the Ninth Circuit's imputation analysis, however, such an alien might be able to impute a parent's prior admission date to become eligible for cancellation of removal under Section 1229b(a). Illogically, the same alien would thus be considered to have two different admission dates in the same removal proceeding—one admission date that determines his removability and another imputed admission date that determines his eligibility to obtain cancellation relief.

2. Given that the plain text and purpose of Section 1229b(a) foreclose imputation of another alien's status

period of residency or date of lawful admission, the questions presented can be resolved at step one of the *Chevron* analysis. See *Chevron*, 467 U.S. at 843 (calling for further inquiry only if "the statute is silent or ambiguous with respect to the specific issue"). Contrary to the Ninth Circuit's conclusion, Section 1229b(a) is not rendered "silent" or "ambiguous" simply because it does not expressly forbid imputation. Cf. *Cuevas-Gaspar*, 430 F.3d at 1022; see also *id.* at 1032 (Fernandez, J., dissenting) (finding that Section 1229b(a) clearly forecloses imputation). If a statute were required to refute every possible alternative not expressly foreclosed, nearly every statute would be silent or ambiguous as to far-fetched alternatives. *Chevron* does not countenance such a result.

But even if the statute were deemed ambiguous, the Board's interpretation that imputation is impermissible—see *In re Escobar*, 24 I. & N. Dec. 231 (B.I.A. 2007) (Section 1229b(a)(1)); *In re Ramirez-Vargas*, 24 I. & N. Dec. 599 (B.I.A. 2008) (Section 1229b(a)(2))—is reasonable and thus entitled to controlling deference at step two of the *Chevron* analysis. See *Chevron*, 467 U.S. at 843-844; see also *Negusie* v. *Holder*, 129 S. Ct. 1159, 1163-1164 (2009) (according *Chevron* deference to Board's interpretation of INA); *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999) (same). The standard for what constitutes an expert agency's reasonable interpretation for *Chevron* purposes is broad, 476 U.S. at 843, and courts ordinarily defer to the Board's interpretation of immigration laws unless the interpretation is "clearly contrary to the plain and sensible reading of the statute," *Mota* v. *Mukasey*, 543 F.3d 1165, 1167 (9th Cir. 2008) (citation omitted). As other courts of appeals have concluded with respect to Section 1229b(a)(2), the

Board's "straightforward" refusal "to read into the statute an [imputation] exception seemingly at odds with the statute's requirements" is at the very least reasonable. *Augustin*, 520 F.3d at 270-271 (holding that the Board's "refusal to create an exception simply heeds the statute's plain requirements"); see also *Deus*, 591 F.3d at 811 (deeming "the [Board]'s interpretation * * * not inconsistent with the statute and therefore permissible under *Chevron*'s deferential review"); *Cuevas-Gaspar*, 430 F.3d at 1032 (Fernandez, J., dissenting). That is the end of the inquiry under *Chevron*.

For the reasons explained above (pp. 10-14, *supra*), the Ninth Circuit's determination that the Board's interpretation is unreasonable, see *Mercado-Zazueta*, 580 F.3d at 1112-1115; *Cuevas-Gaspar*, 430 F.3d at 1024-1029, is unsupported by Section 1229b(a)'s text or purpose. In any event, the Ninth Circuit's reasoning—based on its precedents and policy determinations—fails on its own terms. The chain of the Ninth Circuit's mistaken reasoning began with *Lepe-Guitron* v. *INS*, 16 F.3d 1021 (1994), in which it held that a parent's domicile could be imputed to an unemancipated minor child for purposes of the "domicile" requirement in now-repealed 8 U.S.C. 1182(c). The Ninth Circuit relied on the fact that the statutory term "domicile" incorporates notions of intent, *i.e.*, not only physical presence but an intent to remain indefinitely in the United States. *Lepe-Guitron*, 16 F.3d at 1025 (citations omitted). The Ninth Circuit reasoned that because "children are, legally speaking, incapable of forming the necessary intent to remain indefinitely in a particular place," "a child's domicile follows that of his or her parents." *Ibid.*; see 1 Restatement (Second) of Conflict of Laws § 22(1), at 88

(1971) (providing that generally "[a] minor has the same domicil as the parent with whom he lives").

In *Cuevas-Gaspar*, the Ninth Circuit extended the reasoning of *Lepe-Guitron* to Section 1229b(a)(2) by effectively equating "domicile" with "residence"—the specified metric for Section 1229b(a)(2)'s seven-year requirement. 430 F.3d at 1026. Over a dissent, the panel majority rejected the distinction between residence and domicile, stating summarily that the distinction "is not * * * so great as to be dispositive." *Ibid.* The *Cuevas-Gaspar* majority then took a further leap by reasoning that because *Lepe-Guitron* held "that a parent's 'lawful unrelinquished domicile' is imputed to the parent's minor children," it must have "necessarily held that the parent's *admission* for permanent residence was also imputed to the parent's minor children." *Ibid.* On that basis, it proceeded broadly to permit imputation to the alien child of a parent's "admission" for purposes of satisfying the requirement of Section 1229b(a)(2). *Ibid.*

The Ninth Circuit's extension of *Lepe-Guitron* in *Cuevas-Gaspar* was erroneous in multiple respects. It ignored the well established distinction between "domicile" and "residence." The INA expressly provides that "residence" is to be evaluated "without regard to intent," 8 U.S.C. 1101(a)(33)—a key consideration in determining domicile. Courts are virtually unanimous that the element of intent distinguishes the two concepts in the immigration context (and elsewhere). See, *e.g.*, *Cervantes*, 597 F.3d at 237 ("[T]here is a crucial distinction between a 'domicile' and a 'residence.'"); *Augustin*, 520 F.3d at 271-272 (discussing differences between "domicile" and "residence"); *Rosario* v. *INS*, 962 F.2d 220, 224 (2d Cir. 1992) (noting that, although "[a] minor's domi-

cile is the same as that of its parents," residence is "determined from the physical fact of * * * living in a particular place"); *Chan Wing Cheung* v. *Hamilton*, 298 F.2d 459, 461 (1st Cir. 1962) ("'Residence' within the [INA] is not the equivalent of domicile."); see also, *e.g.*, *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 48 (1989) ("'Domicile' is not necessarily synonymous with 'residence,' and one can reside in one place but be domiciled in another.") (citation omitted); *Gaudin* v. *Remis*, 379 F.3d 631, 637 (9th Cir. 2004) ("The traditional concept of domicile, as contrasted with mere residence, captures well the notion of permanence.").

Crucially, once "intent" is removed from the analysis, "there is no legal reason for [the Court] to turn to [a child's] parents." *Cuevas-Gaspar*, 430 F.3d at 1031-1032 (Fernandez, J., dissenting); see *Cervantes*, 597 F.3d at 237 (stating that children "can have their own residences, separate and apart from that of their parents"); *Deus*, 591 F.3d at 811 (holding that "the relevant inquiry under Section 1229b(a), residence, presents no question regarding a minor's intention").

Moreover, the court in *Lepe-Guitron* discussed the imputation of "domicile" alone and confined its holding to the limited principle "that a child's domicile follows that of his or her parents." 16 F.3d at 1025. *Lepe-Guitron* never purported to hold that a parent's lawful *admission* was imputed to the child; indeed, the court emphasized that the alien child himself had entered the United States legally with his parents. *Id.* at 1024; see also *id.* at 1026 n.12 (noting that only adults had to be lawful permanent residents to accrue domicile status). The Ninth Circuit's reliance in *Cuevas-Gaspar* on *Lepe-Guitron* as supporting imputation of admission (in addition to residency) thus has no basis in that decision. And

Mercado-Zazueta's extension of *Cuevas-Gaspar* as requiring imputation of LPR status is doubly mistaken.

The Ninth Circuit's policy-based arguments likewise do not render the Board's interpretation incorrect, let alone unreasonable under *Chevron*. The Ninth Circuit defended its imputation rule based on what it perceived to be the "high priority" accorded by the immigration statutes "to the relation between permanent resident parents and their children." *Cuevas-Gaspar*, 430 F.3d at 1024 (quoting *Lepe-Guitron*, 16 F.3d at 1025); see *Mercado-Zazueta*, 580 F.3d at 1105-1106. In addition, the Ninth Circuit concluded that the Board had "consistent[ly]" interpreted the immigration laws to "allow[] for imputation of a parent's status to unemancipated minor children" and that any departure in the cancellation-of-removal context would therefore be unreasonable. *Cuevas-Gaspar*, 430 F.3d at 1026; see *Mercado-Zazueta*, 580 F.3d at 1111-1112. Neither argument overcomes the plain language of the statute, but, in any event, the Ninth Circuit is wrong on both accounts.

First, while the INA does provide for an immigration preference (as well as certain other benefits) for children of lawful permanent residents, that preference is not absolute. By way of example, such children (including minors) are still subject to immigration quotas (see 8 U.S.C. 1151-1153 (2006 & Supp. III 2009)) and therefore may be subject to lengthy waiting periods before they can legally immigrate to the United States. In other words, Congress has not categorically put the preference for admitting children of LPR parents above all other requirements of the immigration laws. Imputation, however, essentially allows an alien child an end-run around other statutory limitations, such as those on cancellation-of-removal relief in Section

cancellation of removal. The Third Circuit and the Fifth Circuit have upheld the Board's interpretation of the statute not to permit time imputed from a parent to satisfy Section 1229b(a)(2)'s seven-year continuous residence requirement. See *Deus*, 591 F.3d at 811 (finding an "absence of support in the statutory language or legislative history" for the proposition that a parent's residence "was intended to be counted towards the requirements of Section 1229b(a)"); *Augustin*, 520 F.3d at 270 (describing the Board's refusal to impute as "a straightforward application of the statute's requirements"). The Fourth Circuit, albeit in dicta, also has expressed its disagreement with the Ninth Circuit's imputation rule. See *Cervantes*, 597 F.3d at 236 (agreeing "with two of our sister circuits * * * that have specifically rejected the reasoning of *Cuevas-Gaspar*").[3] That conflict extends *a fortiori* to Section 1229b(a)(1)'s five-year LPR status requirement as well.

Notwithstanding the conflicting authority and several opportunities to correct its course, the Ninth Circuit has chosen not to do so. In September 2009, the Ninth Circuit declined to accord *Brand X* deference to the Board's considered views in *In re Escobar* and *In re Ramirez-Vargas*, *supra*, which were published after the Ninth Circuit's decision in *Cuevas-Gaspar*; the Ninth Circuit instead extended its imputation rule to Section

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[3] Two judges of the Ninth Circuit have also criticized their court's case law. See *Mercado-Zazueta*, 580 F.3d at 1116 (Graber, J., concurring) ("I think that, as a matter of statutory interpretation and *Chevron* deference, *Cuevas-Gaspar* was wrongly decided."); *Cuevas-Gaspar*, 430 F.3d at 1031-1032 (Fernandez, J., dissenting) ("[S]tatute [] could not be more clear" that it "requires seven years of residence subsequent to admission."); see also *Saucedo-Arevalo* v. *Holder*, 636 F.3d 532, 533 n.1 (9th Cir. 2011) ("The issue of imputation is not without controversy.").

1229b(a), and thereby upsets Congress's carefully crafted balance among competing policy concerns.

Second, the other situations identified by the Ninth Circuit in which the Board has allowed imputation of a parent's attributes implicate state of mind. For example, the Board has imputed a parent's abandonment of lawful permanent residence to minor children; abandonment clearly incorporates consideration of the alien's intent. See *In re Huang*, 19 I. & N. Dec. 749, 755 (B.I.A. 1988) (stating that "the immigration judge was incorrect in concluding that the applicant's intent was irrelevant in determining whether she [as well as her children] had abandoned that status"); see also *Augustin*, 520 F.3d at 271 (finding that such cases "are not in direct conflict with the BIA's interpretation of the cancellation statute because the determination in these cases turned in part on the minor alien's intention"). The other situations are similarly distinguishable. See, *e.g.*, *Vang* v. *INS*, 146 F.3d 1114, 1117 (9th Cir. 1998) (likening firm resettlement to domicile); *Senica* v. *INS*, 16 F.3d 1013, 1016 (9th Cir. 1994) (attributing parents' knowledge of misrepresentation in entering the United States to the children). By contrast, the criteria at issue here—"residence," "admission," and "status"—depend solely on an individual's objective conduct or status, coupled with some official action by the government, without regard to mental state—a fact with which the Ninth Circuit has failed to grapple.

B. The Ninth Circuit's Imputation Rule Conflicts With Decisions Of Other Courts Of Appeals

The Ninth Circuit is the only court of appeals that has permitted imputation of another alien's status or period of residency to satisfy the eligibility criteria for

1229b(a)(1), and then denied the government's petition for panel rehearing. See *Mercado-Zazueta*, 580 F.3d at 1113-1115. More recently, the Ninth Circuit denied a petition for rehearing en banc in *Sawyers* v. *Holder*, 399 Fed. Appx. 313 (2010) (mem.), reh'g denied (Feb. 1, 2011), in which the court applied its imputation rule to vacate the Board's decision denying cancellation of removal based on the alien's inability to satisfy Section 1229b(a)(2)'s seven-year continuous residency requirement without relying on the parent's period of residency after admission. Based on the Ninth Circuit's steady expansion of the imputation rule, and its unwillingness to revisit that rule despite a circuit conflict, the questions presented here are ripe for this Court's review.[4]

C. The Ninth Circuit's Rule Has A Substantial Effect On The Administration Of The Immigration Laws

The Ninth Circuit's imputation rule creates significant adverse consequences that underscore the need for

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[4] Although this case implicates both the seven-year continuous residence requirement of Section 1229b(a)(2) (see *Cuevas-Gaspar*) and the five-year LPR status requirement of Section 1229b(a)(1) (see *Mercado-Zazueta*), as respondent cannot satisfy either requirement without imputation, the Board ultimately appeared to deny eligibility for cancellation of removal based on the latter requirement only (presumably due to binding Ninth Circuit precedent in *Cuevas-Gaspar* with respect to the former). App. 5a-6a; but cf. App. 14a-15a (criticizing *Cuevas-Gaspar*). As a result, the Ninth Circuit vacated the Board's decision in light of *Mercado-Zazueta*, citing specifically its holding permitting imputation for purposes of Section 1229b(a)(1). App. 2a. To ensure that both requirements are properly presented to this Court, the government is concurrently filing a petition for a writ of certiorari in *Sawyers*, *supra*, which expressly raises the issue of the use of imputation for purposes of Section 1229b(a)(2)'s seven-year residence requirement. The government requests that certiorari be granted in both cases and that the cases be consolidated for argument.

this Court's review. First, according to information conveyed by the Executive Office of Immigration Review, over 40% of all cancellation-of-removal applications resolved in fiscal year 2010 originated within the Ninth Circuit. For that reason alone, the Ninth Circuit's interpretation of Section 1229b(a) impedes the uniform administration of the immigration laws and affects many cases in which eligibility for cancellation of removal turns on imputation of a parent's status or residency. See *Chen* v. *Mukasey*, 524 F.3d 1028, 1033 (9th Cir. 2008) (quoting *Kaganovich* v. *Gonzales*, 470 F.3d 894, 897 (9th Cir. 2006) (national uniformity is "paramount" in the immigration context); *In re Cerna*, 20 I. & N. Dec. 399, 408 (B.I.A. 1991) ("We think that all would agree that to the greatest extent possible our immigration laws should be applied in a uniform manner nationwide, particularly where the most significant aspects of the law are in issue.").

Second, although no statistics are kept on how many cancellation-of-removal applications would not have been granted but for reliance on imputation, the Ninth Circuit's rules clearly expand the class of removable aliens eligible for such relief. Because criminal aliens are part of that group, see 8 U.S.C. 1227(a)(2) (2006 & Supp. III 2009) (listing criminal grounds on which lawfully present aliens become removable); 8 U.S.C. 1182(a)(2) (2006 & Supp. III 2009) (listing criminal grounds on which an alien is inadmissible), the Ninth Circuit's rules impede the execution of the INA's goal—which the Department of Homeland Security (DHS) has prioritized—of removing criminal aliens. Cf. *Demore* v. *Kim*, 538 U.S. 510, 518-522 (2003) (describing Congress's interest in removal of criminal aliens).

Third, the Ninth Circuit's interpretation imposes an additional burden on the government insofar as it increases litigation before immigration courts and requires DHS to devote resources to litigating facts that would otherwise not be relevant to an alien's cancellation-of-removal case, including facts about events that have occurred many years in the past or about people other than the alien himself.

Fourth, aliens have sought (albeit unsuccessfully thus far) to extend the Ninth Circuit's imputation approach to other immigration contexts beyond Section 1229b(a). See *Saucedo-Arevalo* v. *Holder*, 636 F.3d 532 (9th Cir. 2011) (non-LPR cancellation of removal under 8 U.S.C. 1229b(b)); *De Leon-Ochoa* v. *Att'y Gen. of the U.S.*, 622 F.3d 341 (3d Cir. 2010) (temporary protected status under 8 U.S.C. 1254a); *Cervantes*, *supra* (same); *Barrios* v. *Holder*, 581 F.3d 849 (9th Cir. 2009) ("physical presence" requirement for cancellation of removal under Section 203 of the Nicaraguan Adjustment and Central American Relief Act, Pub. L. No. 105-100, 111 Stat. 2196); *United States* v. *Flores-Villar*, 536 F.3d 990 (9th Cir. 2008) (citizenship), aff'd by an equally divided court, No. 09-5801 (June 13, 2011). This Court's resolution of the questions presented should curtail such subsidiary litigation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
TONY WEST
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
PRATIK A. SHAH
Assistant to the Solicitor General
DONALD E. KEENER
CAROL FEDERIGHI
Attorneys

JUNE 2011

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-70436
Agency No. A078-463-557

CARLOS MARTINEZ GUTIERREZ, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL, RESPONDENT

[Filed: Jan. 24, 2011]

MEMORANDUM*

Submitted January 10, 2011**

On Petition for Review of an Order of the Board of Immigration Appeals

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* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

Before: BEEZER, TALLMAN, and CALLAHAN, Circuit Judges.

Carlos Martinez Gutierrez, a native and citizen of Mexico, petitions for review of the Board of Immigration Appeals' ("BIA") order sustaining the government's appeal from an immigration judge's decision granting his application for cancellation of removal. We have jurisdiction under 8 U.S.C. § 1252, and we grant the petition for review and remand for further proceedings.

Because the BIA decided this case without the benefit of our decision in *Mercado-Zazueta v. Holder*, 580 F.3d 1102, 1113 (9th Cir. 2009) ("[F]or purposes of satisfying the five years of lawful permanent residence required under INA section 240A(a)(1), 8 U.S.C. § 1229b(a)(1), a parent's status as a lawful permanent resident is imputed to the unemancipated minor children residing with that parent."), we remand to the BIA to allow it to reconsider Martinez Gutierrez's cancellation of removal application. *See generally INS v. Ventura*, 537 U.S. 12 (2002) (per curiam).

PETITION FOR REVIEW GRANTED; REMANDED.

APPENDIX B

[Seal Omitted]

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Aguirre, Dario, Esquire
1010 Second Avenue, Suite 1700
San Diego, CA 92101-4997

Office of the District Counsel/SND
880 Front St., Room 1234
San Diego, CA 92101-8834

Name: MARTINEZ GUTIERREZ, CARLOS

A78-463-557

Date of this notice: 1/24/2008

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

/s/ DONNA CARR
DONNA CARR
Chief Clerk

Enclosure

Panel Members:
Guendelsberger, John

U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board
of Immigration Appeals

File: A78 463 557 - San Diego, CA

Date: [JAN 24, 2008]

In re: CARLOS MARTINEZ GUTIERREZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Dario Aguirre,
Esquire

ON BEHALF OF DHS: Kerri A. Harlin
Assistant Chief Counsel

ORDER:

PER CURIAM. The respondent appeals from an Immigration Judge's December 1, 2006, decision in which the respondent, a native and citizen of Mexico, was ordered removed. The respondent argues that he is eligible for cancellation of removal under section 240A(a) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1229b(a).

We find no error in the Immigration Judge's decision. As we previously held in our decision dated September 29, 2006, a parent's lawful permanent resident status cannot be imputed to a child for purposes of cal-

culating the 5 years of lawful permanent residence required to establish eligibility for cancellation of removal under section 240A(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a)(1) (2000). *Matter of Escobar*, 24 I&N Dec. 231 (BIA 2007) (limiting application of *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013 (9th Cir. 2005)). The respondent here is not statutorily eligible for the relief he has requested because he adjusted his status to that of a lawful permanent resident short of the required 5-year statutory period provided by section 240A(a)(1) of the Act, and cannot impute his father's lawful permanent resident status to satisfy his requirement.

Accordingly, the appeal is dismissed.

/s/ JOHN GUENDELSBERGER
FOR THE BOARD

APPENDIX C

IMMIGRATION COURT
446 ALTA ROAD, STE 5400, COURTROOM 1
SAN DIEGO, CA 92158

In the Matter of

Case A78-463-557

MARTINEZ GUTIERREZ, CARLOS
Respondent

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on Dec 1, 2006. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[xx] The respondent was ordered removed from the United States to MEXICO.

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to MEXICO or in the alternative to

[ ] Respondent's application for voluntary departure was granted until upon posting a bond in the amount of $_____ with an alternate order of removal to

[ ] Respondent's application for asylum was ( )granted ( )denied ( )withdrawn.

[ ] Respondent's application for withholding of removal was ( )granted ( )denied ( )withdrawn.

[ ] Respondent's application for cancellation of removal under section 240A(a) was ( )granted ( )denied ( )withdrawn.

[ ] Respondent's application for cancellation of removal was ( )granted under section 240A(b)(1) ( )granted under section 240A(b)(2) ( )denied ( )withdrawn. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's application for a waiver under section ____ of the INA was ( )granted ( )denied ( )withdrawn or ( )other.

[ ] Respondent's application for adjustment of status under section ____ of the INA was ( )granted ( )denied ( )withdrawn. If granted, it was ordered that respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a _____ until ____.

[ ] As a condition of admission, respondent is to post a $____ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[xx] Other: Respondent waives I-589 Relief, Asylum, Withholding, and Convention against Torture

Date: Dec. 1, 2006

Appeal: WAIVED Appeal Due By: Jan 2, 2007

/s/ ZSA ZSA DEPAOLO
ZSA ZSA DEPAOLO
Immigration Judge

APPENDIX D

[Seal Omitted]

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Orendain, Edward
1010 Second Avenue, Suite 1700
San Diego, CA 92101-4997

Office of the District Counsel/SND
880 Front St., Room 1234
San Diego, CA 92101-8834

Name: MARTINEZ GUTIERREZ, CARLOS

A78-463-557

Date of this notice: 09/29/2006

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

/s/ DONNA CARR
DONNA CARR
Acting Chief Clerk

Enclosure

Panel Members:
FILPPU, LAURI S.
O'Leary, Brian M.
PAULEY, ROGER

U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board
of Immigration Appeals

File: A78 463 557 - San Diego Date: [SEP 29, 2006]

In re: CARLOS MARTINEZ-GUTIERREZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Edward Orendain, Esquire

ON BEHALF OF DHS: Kerri A. Harlin
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(E)(i), I&N Act [8 U.S.C. § 1182(a)(6)(E)(i)] - Alien smuggler

APPLICATION: Cancellation of removal

The Department of Homeland Security (the "DHS') appeals from an Immigration Judge's March 1, 2006, decision which granted the respondent, a native and citizen of Mexico, cancellation of removal under section 240A(a) of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1229b(a).

The respondent was born in 1983, and came to the United States illegally in 1989. The respondent's father became a lawful permanent resident in 1991, while the respondent was admitted for lawful permanent residence in October of 2003. The respondent was arrested on December 2, 2005, for attempting to smuggle three

undocumented aliens into the United States. The respondent admitted the factual allegations against him, conceded removability, and applied for the relief of cancellation of removal. Section 240A(a) of the Act provides in relevant part that the Attorney General may cancel removal if the alien: (1) has been an alien *lawfully admitted for permanent residence*[1] for not less than 5 years (emphasis added); (2) has resided in the United States continuously for 7 years after having been admitted in any status; and (3) has not been convicted of any aggravated felony. *See* section 240A(a) of the Act; 8 U.S.C. § 1229(b)(a).

In *Cuevas-Gaspar v. Gonzales,* 430 F.3d 1013 (9th Cir. 2005), the United States Court of Appeals for the Ninth Circuit held that lawful admission and legal permanent residence can be imputed to an unemancipated minor to satisfy the *second prong* requirement of residing in the United States continuously for 7 years after having been admitted. It should be noted that only section 240A(a)(2) of the Act was at issue in *Cuevas-Gaspar* as there was no question that the alien had been a lawful permanent resident for not less than 5 years as required by section 240A(a)(1) of the Act. *See Cuevas-Gaspar v. Gonzales, supra,* at n.5. The Immigration Judge held that the reasoning of the Ninth Circuit's *Cuevas-Gaspar* decision should be applied to the respondent's case. The Immigration Judge goes beyond the scope of that case, however, by expanding and extending the holding in

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[1] The term "lawfully admitted for permanent residence" means "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." *See* 8 U.S.C. § 1101(a)(20).

Cuevas-Gaspar to the *first prong* of the cancellation statute. The Immigration Judge held that the respondent's father's legal permanent residence, acquired in 1991, while the respondent was a minor, could be imputed to the respondent to satisfy the *first prong* requirement that an alien be lawfully admitted for permanent residence for not less than 5 years. This is not the holding in *Cuevas-Gaspar*, and this Board declines to extend the precise holding of *Cuevas-Gaspar* beyond the *second prong* of the cancellation statute.

In finding that lawful admission and legal permanent residence can be imputed to the *second prong* of the cancellation statute, the *Cuevas-Gaspar* court relied heavily on the reasoning in *Lepe-Guitron v. INS*, 16 F.3d 1021 (9th Cir. 2004). In *Lepe-Guitron*, the court concluded that an unemancipated minor residing with his parents shares the same domicile as that of his parents, and that the period of lawful domicile begins when his parents attained permanent resident status while he was a child. The term "admitted" is a term of art defined by the Act as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." *See* 8 U.S.C. § 1101(a)(13). Unlike domicile, which depends on intent or capacity, admission does not depend on either the intent or the capacity of the minor, but rather on inspection and authorization by an immigration officer. Moreover, in *Lepe-Guitron*, the Ninth Circuit interpreted domicile under former section 212(c) of the Act and looked to the minor's parents' intent (as minors are incapable of forming the intent necessary to establish domicile), whereas the present cancellation of removal statute contains no domicile requirement. Instead, it requires residence, which contains no element

of subjective intent. As such, unlike the alien in *Lepe-Guitron,* it was unnecessary to look to the respondent's parent to determine intent under the current cancellation statute. Instead, the critical question was how long had the respondent been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws—or in other words, how long had the respondent been lawfully admitted for permanent residence? *See* 8 U.S.C. § 1101(a)(20); *see* also section 240A(a) of the Act. Moreover, the *Lepe-Guitron* court noted that the alien had legally entered the United States with his parents and had always legally resided within the United States, which is in contrast to the respondent, who had been living illegally in the United States until he was admitted as an adult (and no longer in his parent's custody) in October 2003.

Allowing the imputation of a parent' s status and residence to both the *first* and *second prongs* of the cancellation statue, would essentially destroy the distinct tests mandated by Congress. For example, if imputation is all that is needed, why would an alien ever need to be a lawful permanent resident in his own right? Moreover, why would an alien ever need an admission or period of United States residence or presence? Extending the limited holding of *Cuevas-Gaspar* to the *first prong* of the cancellation statute runs contrary to the clear language of the statute, which requires an alien to be lawfully admitted for permanent residence, in his own right, for no less than 5 years. More importantly, an imputation as to the *first prong* would also run counter to the legislative history that is actually discussed by the Ninth Circuit in

Cuevas-Gaspar.[2] Accordingly, this Board respectfully declines to extend the Ninth Circuit's limited holding in *Cuevas-Gaspar v. Gonzales, supra*, to the *first prong* of the cancellation statute.

To answer the critical question in this case, the respondent adjusted his status to that of a lawful permanent resident a mere 3-years ago in 2003, a full 2 years short of the required 5 year statutory period provided by section 240A(a)(1) of the Act. Therefore, the respondent is not statutorily eligible for the relief he has requested. As such, we reverse the Immigration Judge's determination that the respondent demonstrated that he is eligible for cancellation of removal. Accordingly, the DHS' appeal will be sustained.

ORDER: The DHS' appeal is sustained.

FURTHER ORDER: The proceedings are remanded to the Immigration Court for the entry of an order of removal.

/s/ [ROGER PAULEY]
FOR THE BOARD

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[2] "In enacting the new cancellation of removal provision, Congress resolved the conflicting interpretations of 'unrelinquished lawful domicile' by requiring five years of status as a permanent resident. . . . [T]he language of the new two-part requirement apparently was designed to clear up the prior confusion and to strike a balance between the conflicting interpretations . . . while still requiring at least five years of permanent residence." *See Cuevas-Gaspar*, at 1028.

APPENDIX E

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
San Diego, California

File No.: A 78 463 557 March 1, 2006

In the Matter of

CARLOS MARTINEZ GUTIERREZ Respondent

IN REMOVAL PROCEEDINGS

CHARGE:	Section 212(a)(6)(E)(i) of the Immigration and Nationality Act - alien smuggling.
APPLICATIONS:	Section 240A(a) of the Immigration and Nationality Act - cancellation of removal for certain permanent residents.
	Section 240B(b) of the Immigration and Nationality Act - voluntary departure.

ON BEHALF OF RESPONDENT:
Edward Orendain

ON BEHALF OF DHS:
Kerri Harlin
Assistant Chief Counsel

ORAL DECISION OF THE IMMIGRATION JUDGE

PROCEDURAL FACTS

The respondent, Carlos Martinez Gutierrez, is a 22-year-old native and citizen of Mexico. Respondent came into the United States unlawfully, entering with his parents sometime in 1988 or 1989 when he was five years old. Respondent's father and mother are both legal permanent residents. Respondent's father has been a legal resident since February 7, 1991. Respondent's mother is a lawful permanent resident, but apparently did not receive that status prior to the legal permanent resident status obtained by respondent on October 28, 2003. Respondent has resided in the United States since his initial unlawful entry, and has maintained his residence with his parents.

Respondent came into the United States from Mexico, making his application for admission at the San Ysidro, California port of entry on December 2, 2005. At that time, respondent was detained following inspection when he was found to have three undocumented minors in the vehicle he was driving. Immigration officers made a determination that respondent was inadmissible, serving him with a Notice to Appear charging a violation of Section 212(a)(6)(E)(i) of the Immigration and Nationality Act. The Notice to Appear was served on respondent on December 3, 2005. The Notice to Appear was filed with the United States Immigration Court in San Diego, California on December 6, 2005. This Court has jurisdiction over these removal proceedings pursuant to 8 C.F.R. 1003.14(a) (2005).

Respondent appeared before this Court for an initial Master Calendar hearing on December 29, 2005. Re-

spondent was represented by counsel, and entered a plea admitting allegations of fact relevant to his citizenship and nationality in Mexico. Respondent also admitted his lawful permanent resident status. A determination was made that respondent had been given lawful permanent resident status on October 28, 2003. Respondent denied allegations of fact relevant to alien smuggling. A contested merits hearing was, therefore, scheduled for March 1, 2006. Exhibit No. 2.

Respondent appeared before this Court on February 3, 2006, following the submission and review of documentary evidence within the custody of the Department of Homeland Security relating to alien smuggling. Respondent informed the Court that following a review of the evidence that is in this record as Exhibit No. 3, he would be changing his plea, admitting allegations of fact relevant to alien smuggling. Exhibits 3 and 4. The Court entered a formal finding that respondent is inadmissible, the Government having established a violation of Section 212(a)(6)(E)(i) of the Act by clear, cogent, and convincing evidence. *Woodby v. INS*, 385 U.S. 276 (1966).

STATUTORY ELIGIBILITY FOR RELIEF

Certain facts relevant to statutory eligibility for relief are undisputed. There is no dispute regarding the length of respondent's residence in the United States. Respondent has testified that with the exception of his departure to Mexico in December of 2005, he has maintained a residence in the United States since his original unlawful entry. It is also undisputed that respondent has been a legal permanent resident in the United States since October 28, 2003. Issues relevant to eli-

gibility for relief involve whether or not respondent meets the eligibility requirements pursuant to Section 240A(a)(1) and (2). It is undisputed that respondent has not been convicted for an aggravated felony offense. He meets the eligibility requirements pursuant to Section 240A(a)(3) .

The Court has discussed with the parties that respondent meets the statutory requirements for seven years residence in the United States after having been admitted in any status, a requirement of Section 240A(a)(2). In this regard, the Court and counsel for respondent and the Department acknowledge the 9th Circuit decision in *Cuevas-Gaspar*, 430 F.3d 1013 (9th Cir. 2005). While respondent entered the United States as an unemancipated minor in 1988 or 1989, his father, having become a lawful permanent resident on February 7, 1991, establishes the legal requirement that respondent have the period of lawful residence imputed to him from his father's lawful permanent resident admission. The Court imputes the February 7, 1991 lawful admission of respondent's father to respondent, therefore meeting the eligibility requirements pursuant to Section 240A(a)(2).

The Department of Homeland Security has argued before the Court that the 9th Circuit's decision in *Cuevas-Gaspar*, *supra*, does not reach the issue regarding respondent's eligibility for relief required of Section 240A(a)(1) of the Act. Section 240A(a)(1) requires that respondent meet the eligibility requirement in that he "has been an alien lawfully admitted for permanent residence for not less than five years." The Department of Homeland Security argues that although the lawful permanent resident admission of respondent's father, dated

February 7, 1991, can be imputed to establish respondent's period of residence in the United States, it cannot be computed in making a determination that respondent has been admitted for permanent residence for a period of five years. The Court recognizes that respondent received his lawful permanent resident status on October 28, 2003. Clearly, respondent's date for lawful permanent resident status does not meet the facial requirements of the status relevant to that five year period.

In a careful review of *Cuevas-Gaspar*, *supra*, this Court understands that the 9th Circuit in that decision, consistent with its analysis of Congressional intent and policies regarding families in Immigration, necessarily included the imputation of lawful permanent resident status as well as the period of residence. In this regard, the Court has explained to both parties that the intention of the cancellation applications do not appear to be intended to narrow the scope for eligibility, but instead are interpreted to meet the underlying goals to provide children the necessary lawful admission based on the lawful admission of a parent, thus providing a consistency for eligibility for relief pursuant to both Sections 240A(a)(1) and (2). The 9th Circuit, in *Cuevas*, explains as follows: "In holding that a parent's "lawful unrelinquished domicile" is imputed to the parent's minor child, we necessarily held that the parent's admission for permanent residence was also imputed to the parent's minor children." In explaining its holding in *Cuevas*, the 9th Circuit simply expressed the need for consistency given the Congressional intention regarding family unification. "*Lepe-Guitron* necessarily held that a parent's admission to permanent resident status is imputed to

the child - and to the BIA's own longstanding policy of imputation. . . . "

The Court is convinced, following a careful reading of *Cuevas-Gaspar*, that it would be completely inconsistent with the 9th Circuit's decision for this Court to make a finding that respondent can be afforded the imputation of his father's lawful residence and not find that respondent was entitled to also have imputed to him his father's lawful admission as a legal resident. It would make no sense for this Court to find seven years of residence without allowing respondent the appropriate admission date of February 7, 1991. This Court will find that based on the 9th Circuit's decision in *Cuevas-Gaspar*, respondent has met each of the statutory eligibility requirements, and is eligible for consideration of his application to cancel removal pursuant to Section 240A(a).

THE EXERCISE OF DISCRETION

Respondent has filed the application to cancel deportation and removal from the United States, and has provided supporting documents which establish the positive equities the Court will consider in support of his application. The Department of Homeland Security has also provided the Court with all of the evidence relevant to the violation relevant to alien smuggling. The Court obviously considers the alien smuggling violation as one of the negative factors in the exercise of discretion. *In re C-V-T-*, Int. Dec. 3342, Pages 7 through 15 (BIA 1998). The Court is well aware of its obligation to balance adverse factors which would influence respondent's undesirability as a permanent resident with the social and humane considerations presented on his behalf to

determine whether the granting of the application for relief is in the best interests of the United States. *Id.* Page 11.

In considering negative factors, the Court considers the alien smuggling event of December 2, 2005. Respondent also has a prior conviction. The Court does not have a record of the conviction document. Respondent has testified to a misdemeanor conviction for possession of stolen property while he was a student at New Valley High School.

Respondent has provided testimony today relating to the events of December 2, 2005. The Department has provided the reports from the Immigration inspectors at the port of entry. This Court finds that by engaging in an agreement to smuggle three children into the United States that respondent's behavior was deliberate, was planned, and was intended for respondent's financial gain. Although respondent and his parents are lawful permanent residents, respondent has at least six siblings, four of whom reside in the United States unlawfully. Respondent has a sister who is a legal permanent resident, and a younger brother who is a U.S. citizen. Respondent has grown up with a family that was in the United States unlawfully, at least until respondent's father became a legal permanent resident on February 7, 1991. The legal status for respondent's mother and respondent himself are more recent, that status being granted in 2003.

The Court makes this observation in light of facts presented in this case. Respondent, in agreeing to be involved in alien smuggling, used the U.S. birth certificates of several of his nieces and nephews. In so doing,

respondent also engaged the parents of those children, who are undocumented Mexican nationals, to create notarized letters providing respondent with birth certificates and permission to transport the undocumented children into the United States. This clearly exhibits to the Court a very planned and deliberate effort to deceive Immigration officers regarding the citizenship and nationality of the undocumented children. Moreover, respondent rented a truck or SUV for use in the transportation of the three undocumented children into the United States from Mexico. This Court very rarely sees the involvement of rented automobiles in smuggling cases, unless there is an understanding on the part of the smuggler that the use of private vehicles would certainly include the seizure of those vehicles for a violation of alien smuggling pursuant to the provisions of Section 274 of the Immigration and Nationality Act.

This Court has advised respondent that the factors involved in this particular incident did show a sophisticated level of planning. In this respect, respondent's case is characterized by a level of thought and planning that is inconsistent with an impulsive decision to do someone a favor. The Court is not persuaded by respondent's testimony that he considered that what he was doing was a favor to the mother of the three undocumented children. The Court finds that respondent certainly anticipated financial gain. Although respondent has attempted to minimize the fact that he expected financial return, the Court finds that respondent engaged in this alien smuggling with a full understanding of the legal consequences. Respondent was simply of the misunderstanding that the consequences of alien smuggling would not include the loss of his lawful permanent resi-

dent status. The Court has advised respondent that in the exercise of discretion, had respondent a criminal history of a more serious nature or an Immigration history which included any other violations of the Immigration and Nationality Act, that discretion could not be exercised favorably given the seriousness of this particular event.

The Court is required to consider positive equities, taking into consideration respondent's own relationship with the United States. Respondent was brought into the United States while he was still a young child. His relationship with the United States has been through his experience in a first generation family. Respondent's family includes members who are in the United States legally, as well as family members who reside here unlawfully. Respondent, in his daily life, encounters individuals, like the mother of these three children, who are in the United States living and working here illegally. Living very close to the border and having family in both countries oftentimes creates a culture that minimizes the severity of law enforcement and the Federal requirements for Immigration.

It is respondent's relationship with the United States over an extended period of time, including the fact that he has been educated in the United States, has both of his parents here legally, and has never lived in Mexico, that tips the discretionary scale in his favor.

At the time the respondent was arrested and detained for alien smuggling, neither of his parents were employed. Respondent testified that his father has been on disability and his mother had not been working. Respondent told Immigration officers that he agreed to be

involved in alien smuggling because he expected to be paid at least $1,500. The record establishes, based on respondent's testimony, that he was actually paid that money. The Court recognizes from the entire record that respondent's assertions to Immigration officers regarding financial need are credible.

This Court is persuaded that following three months of incarceration and the time to consider the value of legal permanent residence, this Court is assured that respondent is not likely to re-offend. Respondent could have suffered a criminal conviction in Federal court for alien smuggling, and appreciates the fact that he has not been convicted for an aggravated felony crime. Although this Court may have assumed that respondent was involved in an alien smuggling operation, there appears no evidence to establish any other violation of the Immigration laws outside of the December 5, 2005 alien smuggling attempt. Although the Court recognizes the seriousness of alien smuggling, as stated in this decision, respondent has the necessary equities and is entitled to have the Court consider allowing respondent to maintain his lawful permanent resident status given his new appreciation for the very serious consequences of human trafficking.

The Court will grant the application to cancel deportation and removal. The respondent has established sufficient equities in the United States which outweigh the single but serious alien smuggling event which has brought him before the Court.

Accordingly, the following orders are hereby entered:

ORDER

IT IS HEREBY ORDERED that respondent meets the eligibility requirements pursuant to Section 240A(a)(1) through (3) of the Act.

IT IS FURTHER ORDERED that respondent has met the Court's need to have sufficient positive equities which are exercised favorably in the granting of the application.

ZSA ZSA C. DEPAOLO
Immigration Judge

APPENDIX F

1. 8 U.S.C. 1101 provides in pertinent part:

Definitions

(a) As used in this chapter—

* * * * *

(13)(A) The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

(B) An alien who is paroled under section 1182(d)(5) of this title or permitted to land temporarily as an alien crewman shall not be considered to have been admitted.

(C) An alien lawfully admitted for permanent residence in the United States shall not be regarded as seeking an admission into the United States for purposes of the immigration laws unless the alien—

(i) has abandoned or relinquished that status,

(ii) has been absent from the United States for a continuous period in excess of 180 days,

(iii) has engaged in illegal activity after having departed the United States,

(iv) has departed from the United States while under legal process seeking removal of the alien from the United States, including removal proceedings under this chapter and extradition proceedings,

(v) has committed an offense identified in section 1182(a)(2) of this title, unless since such offense the

alien has been granted relief under section 1182(h) or 1229b(a) of this title, or

(vi) is attempting to enter at a time or place other than as designated by immigration officers or has not been admitted to the United States after inspection and authorization by an immigration officer.

* * * * *

(20) The term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.

* * * * *

(33) The term "residence" means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.

* * * * *

2. 8 U.S.C. 1229b provides in pertinent part:

Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

* * * * *

OPPOSITION BRIEF

No. 10-1542

IN THE
Supreme Court of the United States

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
Petitioner,

v.

CARLOS MARTINEZ GUTIERREZ,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10,494 (Mar. 26, 1986) 16, 17

Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89 ..... 16, 17

STATEMENT OF THE CASE

A. Introduction

The Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.*, vests the Attorney General with unreviewable discretion to cancel the removal from the United States of an alien who committed a removable offense. 8 U.S.C. § 1229b (2006 & Supp. III 2009). The statute, however, sets forth several eligibility requirements, two of which are at issue in the Government's petition: First, the statute requires that the alien seeking cancellation has been "lawfully admitted for permanent residence for not less than 5 years," 8 U.S.C. § 1229b(a)(1); and, second, it requires that the alien "has resided in the United States continuously for 7 years after having been admitted in any status," 8 U.S.C. § 1229b(a)(2). In prior decisions, the United States Court of Appeals for the Ninth Circuit has concluded that both a parent's period of lawful permanent residence status and a parent's period of continuous residence may be imputed to an unemancipated minor for the purposes of satisfying these durational requirements. The Government seeks certiorari with respect to both issues.

The petition does not warrant this Court's review. *First*, this case is the wrong vehicle for this Court to consider the seven-year continuous residence requirement of section 1229b(a)(2). The Government represented below that Respondent's compliance with this requirement was not at issue, and neither the Board of Immigration Appeals (BIA) nor the Ninth Circuit has addressed it. *Second*, there is no circuit split on the question of whether imputation is proper

under the five-year lawful permanent residence requirement of section 1229b(a)(1), as the Ninth Circuit is the only court of appeals to have addressed that issue. This Court's intervention is therefore premature.

Third, the Ninth Circuit is correct on the merits. In permitting imputation of a parent's residence and lawful status under section 1229b(a), the Ninth Circuit merely followed a uniform approach of circuit courts that have permitted such imputation to a minor under the predecessor statute, the former 8 U.S.C. § 1182(c). When Congress amended that provision in 1996, it did so in order to resolve a disagreement among the circuits on an entirely different issue, not to disavow the settled imputation rule.

Nor do the textual differences between the former section 1182(c) and the current section 1229b(a) justify a departure from this prior judicial consensus. On the contrary, the Ninth Circuit's imputation rule is consistent with the existing court and agency practice of imputing a parent's state of mind, intent, and status to a minor child under the INA. Finally, the Ninth Circuit's rule furthers an important congressional goal of promoting family unity through legal immigration, and specifically of maintaining the family relationship between lawful permanent-resident parents and their unemancipated minor children. The petition should be denied.

B. Factual Background

In 1989, when he was five years old, Respondent Carlos Martinez Gutierrez, a citizen of Mexico, was brought to the United States by his parents.

App. 12a, 18a. Since arriving in the United States, Gutierrez has lived with his family in Northern California. Gutierrez's father became a lawful permanent resident in 1991, when Gutierrez was seven years old, App. 12a, 18a, and Gutierrez himself received lawful permanent resident status on October 28, 2003. App. 12a, 19a.

Gutierrez attended elementary and high school in Santa Clara County, California, graduating in 2002. He has been employed since graduation, first at K-Mart and, later, at Costco Wholesale. Gutierrez's sister, a U.S. lawful permanent resident, and his younger brother, a U.S. citizen, also resided with Gutierrez and their parents. At the time he was detained, Gutierrez and his sister were the only working members of the family. App. 25a.

On December 2, 2005, Gutierrez was stopped while trying to re-enter the United States from Mexico with three undocumented minors in his car. App. 18a. Gutierrez first represented that the children were his nephews and niece, but later admitted that they were not his relatives and that they did not have permission to enter the United States. Gutierrez told immigration officers that he had tried to bring the children into the United States at the request of their mother, a friend who was living in the U.S. On December 3, 2005, Gutierrez was issued a Notice to Appear, charging that he was removable under 8 U.S.C. § 1182(a)(6)(E)(i) for attempted alien smuggling. App. 18a.

C. Procedural Background

At a hearing before the Immigration Judge (IJ), Gutierrez conceded removability and sought

cancellation of removal pursuant to 8 U.S.C. § 1229b(a). App. 19a. The IJ found Gutierrez statutorily eligible for cancellation of removal and, in the exercise of her discretion, granted cancellation. App. 27a. In rendering her decision, the IJ relied on *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1021-29 (9th Cir. 2005), which held that a parent's period of continuous residence after admission to lawful status may be imputed to a minor child residing with the parent for the purpose of satisfying section 1229b(a)(2). Guided by the Ninth Circuit's holding, the IJ found that Gutierrez had satisfied the seven-year residence requirement of section 1229b(a)(2). App. 20a. The IJ further concluded that "a careful reading of *Cuevas-Gaspar*" also mandated that the period of his father's lawful permanent resident status be imputed to Gutierrez for the purpose of satisfying section 1229b(a)(1), because Gutierrez had resided with his father as an unemancipated minor. App. 22a.[1]

The BIA reversed. The BIA refused to extend the Ninth Circuit's holding in *Cuevas-Gaspar* to permit the imputation of his father's period of lawful permanent status to Gutierrez in order to satisfy section 1229b(a)(1). App. 16a. Consequently, the BIA concluded that Gutierrez was not eligible for cancellation of removal because he was two years short of section 1229b(a)(1)'s five-year requirement. *Id.*

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[1] There is no dispute that Gutierrez had not been convicted of any aggravated felony, and therefore satisfied section 1229b(a)(3), the third statutory eligibility requirement for cancellation of removal. App. 20a; Pet. 5 n.1.

On remand, the IJ entered an order of removal, as mandated by the BIA. App. 7a. The BIA dismissed Gutierrez's second appeal. App. 6a. The BIA adhered to its prior holding that "a parent's lawful permanent resident status cannot be imputed to a child for purposes of calculating the 5 years of lawful permanent residence required to establish eligibility for cancellation of removal under [section] 1229b(a)(1)." App. 5a-6a. The BIA further observed that it has reaffirmed this position in an intervening precedential decision, *In re Escobar*, 24 I. & N. Dec. 231 (B.I.A. 2007), which limited the application of *Cuevas-Gaspar* to the instances involving the seven-year residence requirement of section 1229b(a)(2). App. 6a. The BIA therefore reiterated its prior conclusion that Gutierrez was not eligible for cancellation of removal because his period of lawful permanent residence fell short of the five-year period required by section 1229b(a)(1). App. 6a.

Gutierrez sought review of the BIA's decision by the U.S. Court of Appeals for the Ninth Circuit. In the proceedings before the court of appeals, the Government stated that "Gutierrez has not been convicted of an aggravated felony, and he has resided in the United States continuously since he arrived in 1989." Br. for Resp't, *Gutierrez v. Holder*, No. 08-70436 (9th Cir. July 29, 2010), at 8-9. Consequently, the Government represented that "the only eligibility requirement at issue is whether Gutierrez has been lawfully admitted for permanent residence for not less than five years." *Id.* at 9.

The Government acknowledged that the Ninth Circuit's recent decision in *Mercado-Zazueta v. Holder*, 580 F.3d 1102, 1113 (9th Cir. 2009), held that

a parent's period of residence in a lawful permanent status should be imputed to a minor child for the purpose of satisfying the five-year requirement of section 1229b(a)(1). Br. for Resp't, *Gutierrez v. Holder*, No. 08-70436 (9th Cir. July 29, 2010), at 9. Nevertheless, the Government sought to preserve its position that section 1229b(a)(1) does not permit a parent's period of lawful permanent residence to be imputed to the parent's minor child for the purpose of calculating the child's period of admission as a lawful permanent resident. *Id.*

The Ninth Circuit granted Gutierrez's petition, and remanded the case to the BIA with direction to reconsider Gutierrez's application for cancellation of removal in light of *Mercado-Zazueta*. App. 2a.

The Solicitor General petitioned this Court for a writ of certiorari presenting two questions: (1) whether imputation of a parent's period of lawful permanent residence status to an unemancipated minor residing with that parent is proper for the purpose of satisfying the five-year requirement of section 1229b(a)(1); and (2) whether imputation of a parent's period of continuous residence to such minor is proper for the purpose of satisfying the seven-year requirement of section 1229b(a)(2). Pet. (I).

REASONS FOR DENYING THE PETITION

A. This Case Is an Inferior Vehicle on One of the Questions Presented, and No Split Exists on the Other Question.

1. This Case Is the Wrong Vehicle on the Question of Imputation of the Seven-Year Residence Requirement of Section 1229b(a)(2).

This case is the wrong vehicle to address the second question presented by the Government — whether a parent's period of continuous residence after lawful admission to the United States can be imputed to an unemancipated minor for the purpose of satisfying section 1229b(a)(2)'s seven-year residence requirement. As the Government concedes, the BIA did not address this question when denying Gutierrez's eligibility for cancellation of removal, basing its decision solely on the five-year bar of section 1229b(a)(1). Pet. 21 n.4; *see also* App. 5a-6a.[2]

While the Government now contends that Gutierrez cannot satisfy the second prong of section 1229b(a) either, Pet. 21 n.4, the Government failed to preserve this issue below. In its brief before the Ninth Circuit, the Government represented that Gutierrez "has resided in the United States continuously since he arrived in 1989," and therefore

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[2] Nor did the BIA address section 1229b(a)(2) in its initial decision denying Gutierrez's eligibility for cancellation of removal, which likewise was based solely on the BIA's conclusion that he cannot satisfy the five-year lawful permanent status requirement of section 1229b(a)(1). App. 16a.

"the only eligibility requirement at issue is whether Gutierrez has been lawfully admitted for permanent residence for not less than five years." Br. for Resp't, *Gutierrez v. Holder*, No. 08-70436 (9th Cir. July 29, 2010), at 9; *see also supra* at 5. Accordingly, the Ninth Circuit's decision addressed only the question whether remand to the BIA was proper given the BIA's refusal to impute to Gutierrez his father's period of lawful permanent residence status. App. 2a.

This Court has repeatedly stated that it "does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *see also Pa. Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998); *City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) (per curiam) (dismissing writ as improvidently granted because this Court "ordinarily will not decide questions not raised or litigated in the lower courts"); *United States v. Mendenhall*, 446 U.S. 544, 551-52 n.5 (1980). Because the issue whether Gutierrez satisfies the seven-year requirement of section 1229b(a)(2) was neither pressed by the Government below nor passed upon by the court of appeals, this Court should adhere to its traditional practice and deny review on the second question presented.

2. No Circuit Split Exists on the Question of Imputation of the Five-Year Lawful Permanent Residence Requirement of Section 1229b(a)(1).

The first question presented — whether a parent's period of lawful permanent residence in the United States can be imputed to an unemancipated minor for the purpose of satisfying section

1229b(a)(1)'s five-year requirement — does not merit review on its own. There is no split on this issue. To date, the Ninth Circuit is the only court of appeals to have addressed the propriety of imputation of a parent's status as a lawful permanent resident to an unemancipated minor child who otherwise would not meet section 1229b(a)(1)'s durational requirement. *See Mercado-Zazueta*, 580 F.3d at 1103, 1112-13.

The other courts of appeals that have addressed the question of whether imputation is permissible under section 1229b(a) have done so only in the context of examining the statute's second prong — the seven-year continuous residence requirement. *See Deus v. Holder*, 591 F.3d 807, 809 (5th Cir. 2009) ("there is no question that Deus has been lawfully admitted as a permanent resident for not less than 5 years;" therefore, "[t]he only issue in this case is whether Deus can demonstrate that she resided in the United States for a continuous seven-year period after being admitted in any status"); *Augustin v. Att'y Gen.*, 520 F.3d 264, 267 (3d Cir. 2008); *see also* Pet. 20 (observing that the Third and the Fifth Circuits have addressed only section 1229b(a)(2)'s seven-year continuous residence requirement).[3]

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[3] The Government also relies on the criticism of the imputation rule expressed by the Fourth Circuit in *Cervantes v. Holder*, 597 F.3d 229 (4th Cir. 2010), which the Government concedes to be dicta. Pet. 9, 20. The issue before the Fourth Circuit — minor siblings' eligibility for the Temporary Protected Status (TPS) — similarly involved only the permissibility of imputation in order to satisfy TPS's dual statutory requirement of "continuous physical presence" and "continuous residence" since a pre-determined date. *Cervantes*, 597 F.3d at 231 (quoting 64 Fed.

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The Government acknowledges that the pertinent language of section 1229b(a)(1) differs in important respects from that of section 1229b(a)(2). Pet. 11-12. Given the recent vintage of the Ninth Circuit's decision in *Mercado-Zazueta*, this Court should permit other courts of appeals to consider the imputation issue in the context of section 1229b(a)(1)'s five-year requirement.

3. This Court Should Await a Superior Vehicle to Consider the Ninth Circuit's Imputation Rule in a Broader Context.

This Court should await a better vehicle, one that would enable the Court to examine the wisdom of the imputation rule in a context involving actual minors, as opposed to individuals, like Gutierrez, who have already reached adulthood. Such a case would better illustrate the respective merits of different approaches to imputation.

The question of whether a parent's period of residence should be imputed to a minor arises in a variety of contexts. *See infra* at 17-19. One such context involves minors who seek an affirmative immigration benefit called Temporary Protective Status (TPS). *See, e.g.*, *Cervantes*, 597 F.3d at 231; *De Leon-Ochoa v. Att'y Gen.*, 622 F.3d 342, 347-48 (3d Cir. 2010). This status is granted to aliens from countries where "an ongoing armed conflict ... pose[s] a serious threat to their personal safety" or that have

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Reg. 524, 525 (Jan. 5, 1999) (internal quotation marks omitted); *see also* 8 U.S.C. § 1254a(c)(1)(A).

suffered considerable devastation as a result of a natural disaster. 8 U.S.C. § 1254a(b)(1)(A), (B)(i). Courts that have considered requests to impute parents' residence periods to minors in order to satisfy the TPS statute's "continuous residence" requirement have expressly acknowledged that their analysis was guided by similar principles as the analysis under section 1229b(a). *See Cervantes*, 597 F.3d at 236-37; *De Leon-Ochoa*, 622 F.3d at 352-53.

A case presenting the propriety of imputation in this situation would enable the Court to examine the question in a context that allows fuller consideration of the rule's impact on actual minors.

4. There Is No Urgency to the Issue Presented, and this Court Should Therefore Allow Further Percolation.

The Government intones that the imputation rule "impedes the government's high-priority efforts to remove criminal aliens." Pet. 9; *see also* Pet. 22. This claim exaggerates the importance of the issue presented.

The relief of cancellation of removal is entirely discretionary. 8 U.S.C. § 1229b(a); *see also Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2589 (2010). An alien's eligibility for cancellation under section 1229b(a) "merely grant[s] access to the possibility of cancellation of removal," with the ultimate determination of whether to grant cancellation remaining in "the sound discretion of the Attorney General." *Mercado-Zazueta*, 580 F.3d at 1115. The decision whether to grant or deny

cancellation of removal is, moreover, insulated from judicial review. 8 U.S.C. § 1252(a)(2)(B)(i).

In the exercise of this discretion, the immigration courts weigh the seriousness of the alien's offense against countervailing equitable factors, such as "family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred at a young age), evidence of hardship to the [alien] and his family if deportation occurs, ... a history of employment, [the] existence of property or business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character." *In re C-V-T-*, 22 I. & N. Dec. 7, 11 (B.I.A. 1998). Here, the IJ considered these factors and determined that Gutierrez merits a grant of cancellation. App. 22a-26a. The immigration courts, however, remain free to deny relief to aliens where the gravity of the criminal offense is not outweighed by the factors counseling in favor of granting discretionary relief. Thus, nothing in the Ninth Circuit's imputation rule imperils the Department of Homeland Security's "prioritized [goal] of removing criminal aliens." Pet. 22.

B. The Ninth Circuit's Decision is Correct on the Merits.

1. The Ninth Circuit Followed Settled Circuit Interpretation of a Predecessor Statute, and Congress Did Not Intend to Alter that Consensus.

Section 1229b was enacted in 1996 to replace former section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). Under section 1182(c), a lawful permanent resident "returning to a lawful unrelinquished domicile of seven consecutive years" was eligible for discretionary cancellation of removal, provided he satisfied other immigration law requirements, such as absence of an aggravated felony conviction.

The circuit courts that have considered the propriety of imputation under section 1182(c) uniformly concluded that a parent's period of legal residency could be imputed to a child for the purpose of satisfying the seven-year unrelinquished domicile requirement. *See Morel v. INS*, 90 F.3d 833, 841 (3d Cir. 1996), *vacated on reconsideration on other grounds*, 144 F.3d 248 (3d Cir. 1998); *Lepe-Guitron v. INS*, 16 F.3d 1021, 1026 (9th Cir. 1994); *Rosario v. INS*, 962 F.2d 220, 224-25 (2d Cir. 1992). As these courts explained, a child's domicile follows that of his parents. These circuits reasoned that, prior to the age of majority, a child was unable to form the intent necessary to establish a domicile. *See Lepe-Guitron*, 16 F.3d at 1025; *Morel*, 90 F.3d at 840; *Rosario*, 962 F.2d at 224. Accordingly, "because 'most minors are legally incapable of forming the requisite intent to

establish a domicile, their domicile is determined by that of their parents.'" *Morel*, 90 F.3d at 841 (quoting *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 48 (1989)).

Importantly, the courts of appeals explained that permitting imputation under the former section 1182(c) furthered Congress' intent, by fostering the INA's goal of family unity. *See Morel*, 90 F.3d at 841 ("[v]arious provisions of the INA reflect Congress' intent to prevent the unwarranted separation of parents from their children"). This overarching goal of the INA applies with special force in the context of lawful permanent residents and their children, given these individuals' determination to make the United States their permanent home. *See Lepe-Guitron*, 16 F.3d at 1025 (the INA gives "high priority to the relation between permanent resident parents and their children").

When Congress amended section 1182(c) in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 304(a)(3), 110 Stat. 3009-594 (1996), and replaced it with the current section 1229b(a), it did not intend to alter this settled judicial rule of imputation. Instead, the amendment was meant to resolve a deep circuit split as to whether section 1182(c)'s requirement of "lawful unrelinquished domicile of seven consecutive years" demanded that an alien be admitted for permanent residence before the seven-year period can commence, or whether it required only that the alien be admitted eventually to lawful permanent status. *See* 141 Cong. Rec. S6082, S6104 (May 3, 1995); *see also Mercado-Zazueta*, 580 F.3d at 1107 (describing the circuit split). As the U.S.

Department of Justice explained, the amendment was designed to "clarify an area of the law regarding the cutoff periods for these benefits that have given rise to significant litigation and different rules being applied in different judicial circuits." 141 Cong. Rec. at S6104.

In enacting section 1229b(a), Congress resolved this disagreement among the circuits by imposing a dual durational requirement: five years of lawful permanent status and seven years of continuous residence after admission to any lawful status. 8 U.S.C. § 1229b(a)(1), (2). In enacting this dual requirement, section 1229b(a) explicitly specified the length both of an alien's lawful permanent status and of his continuous residence in order to qualify for cancellation of removal. But there is no indication that the amendment enacted as a part of IIRIRA was meant to affect the ongoing circuit consensus that a parent's status or residence may be imputed to a child. *See Augustin*, 520 F.3d at 269 n.5 ("IIRIRA's legislative history does not provide support for [an] inference" "that Congress in IIRIRA eliminated the word 'domicile' in favor of 'residence' in order to eliminate imputation"). "'Congress is presumed to be aware of a[] judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.'" *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 2492 (2009) (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978)). Had Congress intended to overturn a uniform conclusion of the circuit courts, "it knew how to do so." *Touche Ross & Co. v. Redington*, 442 U.S. 560, 572 (1979).

The Government focuses on the fact that the former section 1182(c) used the term "domicile,"

whereas the current section 1292b(a) employs the term "residence." Pet. 16-17. But the Government is mistaken that intent is altogether absent from a determination of a minor's residence. As this Court explained, "[a]lthough the meaning may vary according to context, 'residence' generally requires both physical presence *and an intention to remain*." *Martinez v. Bynum*, 461 U.S. 321, 330 (1983) (emphasis added). "This classic two-part definition of residence has been recognized as a minimum standard in a wide range of contexts time and time again." *Id.* at 331. Like domicile, then, residence traditionally includes an element of intent, and Congress that enacted section 1229b(a) is presumed to have been well aware of this settled understanding.

It is true that the INA provides that "residence" is to be evaluated "without regard to intent." 8 U.S.C. § 1101(a)(33); *see also* Pet. 16-17. But it does not follow that, in enacting section 1229b(a) Congress disregarded, without explanation, settled understanding that a minor's residence is determined by that of his parents, precisely because a minor is incapable of choosing residence (and so, by necessity, his parents' intent to make a certain place his residence is imputed to the minor). *See Lepe-Guitron*, 580 F.3d at 1025; *Morel*, 90 F.3d at 840; *Rosario*, 962 F.2d at 224; *supra* at 13-15.[4] "Children ... normally

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[4] The courts of appeals' decisions seeking to determine the "habitual residence" of children under the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention), Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89, *reprinted in* 51 Fed. Reg. 10,494 (Mar. 26, 1986), are instructive in this regard. The Hague Convention seeks to

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lack the material and psychological wherewithal to decide where they will reside." *Mozes v. Mozes*, 239 F.3d 1067, 1076 (9th Cir. 2001). For this reason, a minor's residence, like domicile, should be construed based on the residency of a parent.

2. The Ninth Circuit's Decision Is Consistent with Settled Judicial and Agency Practice.

This petition should also be denied because the Ninth Circuit's imputation rule is consistent with the existing practice of courts and the BIA to impute a parent's state of mind, intent, and status to a minor alien child.

Imputation of the duration requirements of section 1229b(a) is only one of numerous immigration contexts where courts and the BIA impute parental state of mind, intent, and status to the parents' unemancipated minor children. Courts have "allowed imputation precisely because the minor either was legally incapable of satisfying one of these criteria or could not reasonably be expected to satisfy it independent of his parents." *Barrios v. Holder*, 581 F.3d 849, 862 (9th Cir. 2009).

(...continued)

protect children from wrongful removal by one parent without the consent of another, and "to ensure their prompt return to the State of their habitual residence." 51 Fed. Reg. at 10,498. The Hague Convention does not define the term "habitual residence." *Gitter v. Gitter*, 396 F.3d 124, 131 (2d Cir. 2005). In conducting this inquiry, therefore, the courts of appeals have "inquire[d] into the shared intent of those entitled to fix the child's residence (usually the parents)." *Gitter*, 396 F.3d at 134.

Thus, in the asylum context, courts hold that a minor child's status must be assumed to be the same as that of the parents. *See Vang v. INS*, 146 F.3d 1114, 1116 (9th Cir. 1998) (applying 8 C.F.R. § 207.1(c) to make a determination of whether a minor "has firmly resettled in another country"). As the court in *Vang* noted, "it would be unreasonable to hold an adolescent responsible for arranging or failing to arrange permanent resettlement," precisely because it is a parent's duty to do so. *Id.* at 1116 (internal quotation marks and citation omitted).

In many cases, imputation actually works to the alien's detriment. For example, the BIA imputes a parent's abandonment of lawful permanent residence to his minor children, maintaining that a minor child has "abandoned [his] status as a permanent resident when [his] parents abandoned their status while [he] was still a minor in their care and custody." *Shyiak v. Bureau of Citizenship & Immigration Servs.*, 579 F. Supp. 2d 900, 903 (W.D. Mich. 2008) (quoting a decision by the Citizenship and Immigration Services — a Department of Homeland Security component agency — holding an alien ineligible for naturalization after imputing to the alien his parents' abandonment of their lawful permanent status); *see also In re Zamora*, 17 I. & N. Dec. 395, 396 (B.I.A. 1988) (imputing parents' abandonment of lawful permanent residence to minor child); *In re Winkens*, 15 I. & N. Dec. 451, 452 (B.I.A. 1975) (same).

Courts have affirmed these decisions of the BIA. *See Usmani v. Att'y Gen.*, 341 Fed. App'x 473, 476 (11th Cir. 2009) (upholding the BIA's order of removal based on an imputation to the minor alien of his parents' intent to abandon lawful permanent

resident status); *Nikoi v. Att'y Gen.*, 939 F.2d 1065, 1070-75 (D.C. Cir. 1991) (upholding the BIA's practice of imputing parents' abandonment of lawful permanent residence to the U.S.-born children of foreign diplomats in denying naturalization).

The BIA imputes parental state of mind to minors in other contexts as well. The BIA imputes parental knowledge of inadmissibility to a minor child for the purposes of determining whether the child would qualify for a waiver of removal under 8 U.S.C. § 1182(k) — a provision that permits a waiver if the alien did not know or could not have known of facts establishing his inadmissibility. *See Mushtaq v. Holder*, 583 F.3d 875, 878 (5th Cir. 2009) (upholding a BIA decision to impute the parent's knowledge of inadmissibility to the child); *Senica v. INS*, 16 F.3d 1013, 1014 (9th Cir. 1994) (same).

The BIA's widespread reliance on imputation lessens considerably the degree of deference its rejection of imputation under section 1229b(a) should receive. *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993). The Ninth Circuit was therefore correct to refuse to defer to the BIA's position, especially given that deportation or removal is a "drastic measure" and "a particularly severe penalty." *Padilla v. Kentucky*, 130 S. Ct. 1473, 1478, 1481 (2010) (internal quotation marks and citation omitted). Removal is a particularly significant consequence for a lawful permanent resident like Gutierrez, whose familial ties are in the United States, not in Mexico. As the BIA previously acknowledged, "drastic deprivation may follow if a resident of the United States is compelled to forsake all bonds formed in this country and go to a foreign

land where the resident often has no current ties." *In re Huang*, 19 I. & N. Dec. 749, 754 (B.I.A. 1988) (citing *Woodby v. INS*, 385 U.S. 276, 285 (1966)). Given these weighty equities, the Ninth Circuit has correctly applied the settled principle of "construing any lingering ambiguities in deportation statutes in favor of the alien." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987).

3. The Ninth Circuit's Imputation Rule Furthers Congress' Important Goal of Promoting Family Unity in the Immigration Context.

Finally, the petition should be denied because the Ninth Circuit's imputation rule furthers Congress' goal under the INA of placing "a high priority on relations between permanent legal residents and their children." *Cuevas-Gaspar*, 430 F.3d at 1025-26. As the Third Circuit acknowledged, even while rejecting the Ninth Circuit's approach, the INA is driven by the goal of maintaining family relationships among lawful-permanent-resident parents and their children. *Augustin*, 520 F.3d at 270.

Several provisions of the INA highlight the statute's emphasis on prioritizing familial relations and providing favorable provisions for immediate family members. Section 1254a(c)(2) allows an IJ, in considering a grant of Temporary Protected Status, to waive certain excludability provisions of 8 U.S.C. § 1182(a), in order to "assure family unity." To promote "family reunification," a waiver of excludability is provided for persons caught smuggling undocumented aliens if those undocumented persons are immediate relatives.

8 U.S.C. § 1182(a)(6)(E)(ii). Likewise, section 1227(a)(1)(E)(iii) (former 8 U.S.C. § 1251(a)(1)(H)) allows the Attorney General to waive deportation of an alien who gained entry by fraud or misrepresentation if the alien is the "spouse, parent, son, or daughter" of a United States citizen or a lawful permanent resident. *See INS v. Yeuh-Shaio Yang*, 519 U.S. 26, 29 (1996).

Other provisions allow close family members to enter the country as a unit or provide opportunity for the family unit to re-constitute itself as quickly as possible. Thus, spouses and unmarried minor children of lawful permanent residents receive priority in visas for permanent resettlement in the United States. 8 U.S.C. §§ 1152, 1153. Similarly, the asylum provisions give priority to immediate family members: the "spouse or child ... of an alien who is granted asylum ... may, if not otherwise eligible for asylum ..., be granted the same status as the alien if accompanying, or following to join, such alien." 8 U.S.C. § 1158(b)(3)(A). Importantly, the naturalization provisions, arguably the most stringent of the INA, illustrate Congress' intent to maintain family unity by allowing minor children in the legal and physical custody of their naturalized parents to become United States citizens automatically. 8 U.S.C. § 1433 (2006 & Supp. III 2009).

The BIA has long acknowledged this policy. In *In re C-V-T-*, 22 I. & N. Dec. at 11, the BIA explained that an IJ considering cancellation of removal should give considerable weight to "such factors as family ties within the United States, residence of long duration in this country (particularly when the

inception of residence occurred at a young age), [and] evidence of hardship to the respondent and his family if deportation occurs."

The immigration agencies' practice further illustrates the priority that the INA places on family unity, and demonstrates that imputation of parental state of mind, intent, or status to minors can advance this goal. This agency practice assumes that parents make legal and status decisions on behalf of their children. The application for asylum and withholding of removal (Form I-589), for example, allows an applicant to include his spouse and unmarried children under the age of twenty-one on the primary application, not requiring a separate application for the spouse or children. Similarly, an applicant for the 2012 Diversity Immigrant Visa Program (DV-2012) must include a spouse and minor children on the primary application.

As this practice illustrates, the Ninth Circuit's rule simply allows for the implementation of the INA in the manner envisioned by Congress, which intended the law to encourage family unity and reunification. In contrast, the rule urged by the Government is flatly contrary to this important Congressional goal.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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August 2011

REPLY BRIEF

Nos. 10-1542 and 10-1543

In the Supreme Court of the United States

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
PETITIONER

v.

CARLOS MARTINEZ GUTIERREZ

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
PETITIONER

v.

DAMIEN ANTONIO SAWYERS

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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In the Supreme Court of the United States

Nos. 10-1542 and 10-1543

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
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CARLOS MARTINEZ GUTIERREZ

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

Despite a clear conflict with other courts of appeals, the Ninth Circuit has refused to reconsider its rule permitting an alien to "impute" his parent's period of residence after having acquired lawful permanent resident (LPR) status, or after having been admitted in any status, to gain his own eligibility for cancellation-of-removal relief. That imputation rule finds no support in the statutory language and is contrary to the interpretation of the Board of Immigration Appeals (Board). Con-

trary to respondents' contentions, these two cases together provide the Court an appropriate vehicle to correct the Ninth Circuit's course and restore uniformity in the availability of this form of immigration relief.

A. The Ninth Circuit's Decisions Are Incorrect

The cancellation-of-removal statute, 8 U.S.C. 1229b(a), requires (in relevant part) that "the alien" "(1) ha[ve] been an alien lawfully admitted for permanent residence for not less than 5 years," and "(2) ha[ve] resided in the United States continuously for 7 years after having been admitted in any status." The Ninth Circuit permits circumvention of those requirements by allowing an alien to impute to himself the years of lawful residence and LPR status accrued by someone else—the alien's parent. As explained in the *Gutierrez* petition (at 9-19), the Ninth Circuit's imputation rule is contrary to the plain language of the statute and the Board's authoritative interpretation, both of which require that "the alien" *personally* satisfy Section 1229b(a)'s requirements. Respondents' contrary arguments fail.

1. Contrary to Sawyers's contention (Br. in Opp. 12-13), Section 1229b(a)'s lack of an express bar on imputation is not tantamount to permitting imputation or even to leaving the issue open for agency resolution. "A statute can be unambiguous without addressing every interpretive theory offered by a party." *Salinas* v. *United States*, 522 U.S. 52, 60 (1997); see *Pruidze* v. *Holder*, 632 F.3d 234, 240 (6th Cir. 2011) (explaining that statutory silence does not always indicate a "gap to fill"). Nothing in Section 1229b(a) nor in the broader statutory context suggests that Congress intended to permit cancellation-of-removal relief for aliens who do

not themselves satisfy the statute's express eligibility requirements. See *Gutierrez* Pet. 9-14.

2. Because Section 1229b(a)'s language leaves no room for the Ninth Circuit's imputation rule, respondents' reliance (*Sawyers* Br. in Opp. 14-16; *Gutierrez* Br. in. Opp. 13-17) on the legislative history and legal context underlying the enactment of Section 1229b(a) as a replacement for former 8 U.S.C. 1182(c) (1994) is misplaced. See, *e.g.*, *Schindler Elevator Corp.* v. *United States*, 131 S. Ct. 1885, 1893 (2011) ("In interpreting a statute, [the Court's] inquiry must cease if the statutory language is unambiguous.") (citations and internal quotation marks omitted).

In any event, respondents' argument that it was "settled" (*Sawyers* Br. in Opp. 16) that the previous domicile-based statute permitted imputation is irrelevant. The residency requirement in Section 1229b(a) fundamentally differs from the intent-based domicile requirement under former Section 1182(c) that originally led to the Ninth Circuit's imputation rule.[1] *Gutierrez* Pet. 15-17; see 8 U.S.C. 1101(a)(33) (defining "residence" to be "without regard to intent").[2] As respondents ac-

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[1] Sawyers (Br. in Opp. 17) is mistaken in contending that the Ninth Circuit had held that imputation under former Section 1182(c) applied not only to domicile but also to a parent's admission and lawful status. See *Gutierrez* Pet. 17 (analyzing *Lepe-Guitron* v. *INS*, 16 F.3d 1021 (1994)). In any event, such a holding would have been incorrect for the same reasons the decisions below are incorrect.

[2] Gutierrez (Br. in Opp. 16) relies on *Martinez* v. *Bynum*, 461 U.S. 321, 330-331 (1983), for the proposition that "residence traditionally includes an element of intent." But see *id.* at 330 (noting that "the meaning [of 'residence'] may vary according to context"). Even if that were "traditionally" the case, the definition of "residence" under the immigration laws, as quoted in the text, expressly makes intent irrelevant.

knowledge, the Section 1182(c) cases reasoned that "because most minors are legally incapable of forming the requisite intent to establish a domicile, their domicile is determined by that of their parents." *Gutierrez* Br. in Opp. 13-14 (citations and internal quotation marks omitted). There is no similar intent-based requirement in Section 1229b(a) to support the use of imputation for cancellation of removal. Whether "Congress in IIRIRA eliminated the word 'domicile' in favor of 'residence' in order to eliminate imputation" (*Sawyers* Br. in Opp. 17) or for some other purpose (*Gutierrez* Br. in Opp. 14-15) is beside the point; the pertinent fact is that there is no longer any intent-based requirement on which imputation can be predicated. Respondents' contention (*Sawyers* Br. in Opp. 17; see *Gutierrez* Br. in Opp. 15) that Congress "authorized the imputation rule" therefore lacks any support in the text or legislative history; indeed, respondents cite no evidence that Congress approved of imputation under the old (let alone the new) statute.

3. Even assuming ambiguity as to the permissibility of imputation, respondents' attempt (*Gutierrez* Br. in Opp. 19-20; *Sawyers* Br. in Opp. 17-20) to deny *Chevron* deference to the Board's interpretation of Section 1229b(a), as set out in published decisions, lacks merit. Respondents nowhere contend (nor could they contend) that the Board's interpretation rejecting imputation is foreclosed by the terms of the statute. Although respondents assert that the Board's interpretation is not entitled to *Chevron* deference because the Board has been "inconsistent" (*Sawyers* Br. in Opp. 17), they cite only instances in which the Board has permitted imputation "in other contexts" under different statutory provisions. *Id.* at 17-20; *Gutierrez* Br. in Opp. 18-20 (citing cases

involving imputation as to "firm[] resettle[ment]"; "abandonment"; and "knowledge of inadmissibility"). As the government's certiorari petition in *Gutierrez* explains (at 19), those other contexts (unlike this one) involved intent or "state of mind" requirements which the Board reasonably determined should not be ascertained based on the minor alien alone. The Board has been consistent in its rejection of imputation of objective legal status under Section 1229b(a) and has explained its reasoned (and reasonable) rejection of the Ninth Circuit's contrary rule in detail. *Gutierrez* Pet. 14-15; see, *e.g.*, *In re Escobar*, 24 I. & N. Dec. 231, 232-235 (B.I.A. 2007).

4. Contrary to respondents' suggestion (*Sawyers* Br. in Opp. 21-22; *Gutierrez* Br. in Opp. 20-22), a general Congressional preference for preserving family unity—in particular, keeping parents together with unemancipated minor children—does not trump the terms of Section 1229b(a), as authoritatively interpreted by the Board. To begin with, respondents are not unemancipated minors seeking to reunite or remain with their parents in the United States; they are adults seeking to avoid removal, after committing removable offenses, by retroactively availing themselves of their parents' residence and status. *Gutierrez* Pet. 4, 12-13; *Sawyers* Pet. 3-4. In any event, as explained in the *Gutierrez* petition (at 18-19), that preference is not absolute. For example, when Gutierrez was admitted as a lawful permanent resident in October 2003, children of lawful permanent residents immigrating from Mexico had to wait over seven years (ten years if over the age of 21) for a visa. See U.S. Dep't of State, *Visa Bulletin for October 2003*,

http://www.travel.state.gov/visa/bulletin/bulletin2985.html.[3]

B. The Questions Presented Warrant Immediate Review

1. The conflict among the courts of appeals warrants this Court's review. As Sawyers concedes (Br. in Opp. 9), the Ninth Circuit's rule permitting imputation to satisfy Section 1229b(a)(2)'s seven-year continuous residence requirement squarely conflicts with the Fifth Circuit's decision in *Deus* v. *Holder*, 591 F.3d 807, 811-812 (2009). That conflict alone is sufficient to warrant this Court's review, especially in light of the Ninth Circuit's considered refusal to revisit its erroneous imputation rule notwithstanding the conflict. See *Gutierrez* Pet. 20-21.

Sawyers attempts (Br. in Opp. 9-10) to distinguish the Third Circuit's conflicting decision in *Augustin* v. *Attorney General of the United States*, 520 F.3d 264 (2008), on the ground that the alien in that case was not physically present in the United States for the requisite period. The Third Circuit's decision, however, rejects the Ninth Circuit's reasoning separate and apart from that ground. See *id.* at 270-271 (rejecting various aspects of the Ninth Circuit's reasoning); see also *Deus*, 591 F.3d at 811 (noting that although *Augustin* might have rested in part on the fact that the alien did not re-

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[3] For that reason, the delay in alien children obtaining LPR status may be attributable in certain cases to the waiting time for immigrant visas and not to any decision on the part of the alien's parents. Contrary to Sawyers's suggestion (Br. in Opp. 20-21), however, the Ninth Circuit's imputation rule does not require a court to examine the reasons why an alien did not obtain LPR status when his parent obtained that status. Nor does the statute provide any basis for such an inquiry. Cf. *Mercado-Zazueta* v. *Holder*, 580 F.3d 1102, 1115-1116 (9th Cir. 2009) (Graber, J., concurring).

side in the United States during the relevant period, "the Third Circuit also rejected other arguments that form the basis of the *Cuevas-Gaspar* decision"). In light of the Fourth Circuit's similar disagreement with the imputation rule, see *Cervantes* v. *Holder*, 597 F.3d 229, 236 (2010) (in dicta), three courts of appeals have now expressly rejected the Ninth Circuit's approach.

2. Although Gutierrez is technically correct in arguing (Br. in Opp. 8-9) that the circuit conflict described above involves the seven-year continuous residence requirement of Section 1229b(a)(2), the Third, Fourth, and Fifth Circuits' rejection of imputation in that context logically entails rejection of imputation in the context of the five-year LPR status requirement of Section 1229b(a)(1). The Ninth Circuit's basis for extending imputation to Section 1229b(a)(1) was its "controlling precedent" in *Cuevas-Gaspar* v. *Gonzales*, 430 F.3d 1013 (2005), permitting imputation under Section 1229b(a)(2). See *Mercado-Zazueta* v. *Holder*, 580 F.3d 1102, 1109 (2009). Tellingly, neither the Ninth Circuit nor respondents provide any potential basis for permitting imputation under Section 1229b(a)(2) but not 1229b(a)(1) (or vice versa). Because the same (erroneous) Ninth Circuit precedents underlie both requirements, it makes sense for the Court to consider them together rather than await a separate (but inevitable) rejection by other courts of imputation under Section 1229b(a)(1) as well. To the extent the Court agrees with Gutierrez that his case presents only the Section 1229b(a)(1) issue,[4] the

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[4] Gutierrez takes too narrow a view of the proceedings below when asserting (Br. in Opp. 7-8) that a challenge to the use of imputation to meet Section 1229b(a)(2)'s seven-year continuous residence requirement is not presented in his case. Neither party disputed below that, without imputation, Gutierrez cannot meet *either* statutory require-

Court can safely reach both issues by granting both petitions. Indeed, that is a significant reason why the government has sought certiorari in these two cases together. See *Gutierrez* Pet. 21 n.4; *Sawyers* Pet. 7 n.2.[5]

3. Nor is further "percolation" (*Sawyers* Br. in Opp. 11; *Gutierrez* Br. in Opp. 11) warranted to allow the lower courts to address the full range of possible circumstances. The government's position is that imputation under Section 1229b(a) is impermissible *regardless* of the alien's circumstances. For example, the government's position is that imputation is not available even where the alien has continuously resided with his parents for the requisite period and has become an LPR himself before or upon reaching the age of majority (see *Sawyers* Br. in Opp. 11-12 & n.5).

4. Sawyers argues (Br. in Opp. 6) that "it is not evident that the issue here arises with great frequency." Although the government does not have comprehensive

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ment at issue. *E.g.*, *Gutierrez* Pet. App. 20a-21a. Because the Ninth Circuit already had held imputation must be allowed for purposes of Section 1229b(a)(2) at the time of the immigration proceedings, the immigration judge and the Board focused on the Section 1229b(a)(1) requirement. But in that process the Board criticized the Ninth Circuit's decision in *Cuevas-Gaspar* permitting imputation under Section 1229b(a)(2). *Id.* at 14a-15a. On petition for review to the Ninth Circuit, the government argued that "the cancellation statute does not permit imputation under any circumstances." Gov't C.A. Br. 13. Given the interrelated nature of the issues and the procedural posture, that is sufficient to allow this Court to reach the Section 1229b(a)(1) issue even in Gutierrez's case.

[5] Although Gutierrez suggests (at 10-11) that the Court should take up the imputation issue in the Temporary Protected Status context instead, he alleges no conflict under that statute, and the courts of appeals have (correctly) rejected imputation in that context. See *De Leon-Ochoa* v. *Attorney Gen. of the U.S.*, 622 F.3d 341 (3d Cir. 2010); *Cervantes*, *supra*.

data, the Ninth Circuit, relying on its published decisions in *Mercado-Zazueta* and *Cuevas-Gaspar*, has decided in 2011 alone at least 11 cases (in addition to these two) raising the same issues. See *Rodriguez* v. *Holder*, No. 07-73224, 2011 WL 2412555 (June 16, 2011); *Mendiola-Sanchez* v. *Holder*, No. 08-71522, 2011 WL 2259812 (June 9, 2011); *Pimentel-Ornelas* v. *Holder*, No. 09-70437, 2011 WL 1762572 (May 10, 2011); *Portillo* v. *Holder*, No. 09-70334, 2011 WL 1762573 (May 10, 2011); *Fernandez* v. *Holder*, No. 08-71372, 2011 WL 1770855 (May 10, 2011); *De Hernandez* v. *Holder*, No. 08-71124, 2011 WL 1747993 (May 9, 2011); *Camacho* v. *Holder*, 412 Fed. Appx. 32 (2011); *Gallardo-Sanchez* v. *Holder*, 411 Fed. Appx. 102 (2011); *Becerra* v. *Holder*, 411 Fed. Appx. 67 (2011); *Guardiano* v. *Holder*, 411 Fed. Appx. 74 (2011); *Hernandez Barron* v. *Holder*, 411 Fed. Appx. 85 (2011). Indeed, since filing the two present petitions in June 2011, the government has filed three more petitions for certiorari raising the same issues and suggesting that those petitions be held pending disposition of the two petitions here. *Holder* v. *Mojica*, No. 11-99 (filed July 25, 2011); *Holder* v. *Camacho*, No. 11-103 (filed July 25, 2011); *Holder* v. *Becerra*, No. 11-104 (filed July 25, 2011).[6] And, of course, the issue has arisen frequently enough to generate published decisions in at least two other courts of appeals, thereby giving rise to the circuit conflict discussed above (pp. 6-7, *supra*).

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[6] We understand that the aliens in those subsequently filed petitions do not plan to file responses until the Court adjudicates these two petitions. There is thus no need to delay resolution of the present petitions; to the contrary, the resolution of these petitions will inform the proper disposition of the other three.

5. Respondents also take issue with the government's concern that the imputation rule impedes the execution of its priority goal of removing criminal aliens. Respondents contend that the concern is overstated because, notwithstanding a finding of eligibility based on imputation, immigration judges "remain free to deny relief" to aliens convicted of sufficiently "grave" offenses at the discretionary stage of the inquiry. *Gutierrez* Br. in Opp. 11-12; see *Sawyers* Br. in Opp. 6-7.

Under current procedures, however, immigration judges are not as "free" as respondents suggest to deny relief to statutorily eligible aliens. An immigration judge cannot, for example, simply deny an application based on the nature of the alien's criminal conviction. Rather, the immigration judge must consider all the applicable required factors set out in *In re C-V-T-*, 22 I. & N. Dec. 7, 11-12 (B.I.A. 1998). See, *e.g.*, *Zheng* v. *Holder*, 644 F.3d 829, 833 (9th Cir. 2011) ("[T]he BIA abuses its discretion when it fails to consider all favorable and unfavorable factors bearing on a petitioner's application for [discretionary] relief."); *In re Sotelo-Sotelo*, 23 I. & N. Dec. 201, 204 (B.I.A. 2001) ("[A] complete review of the favorable factors in the case is required.") (citation and internal quotation marks omitted). That process may require an evidentiary hearing and additional detention pending further proceedings. The process thus imposes a burden on both immigration judges and the Board, as well as on the Department of Homeland Security in presenting the cases, and delays the removal of certain criminal aliens (those who would be statutorily ineligible for cancellation without imputation) to whom discretionary relief is ultimately denied. And in Gutierrez's case, the imputation issue is dispositive of his removability, as the immigration judge

granted him cancellation of removal (*Gutierrez* Pet. App. 22a-27a).

In any event, this Court recently has granted review on questions of eligibility for discretionary relief under the immigration laws. See, *e.g.*, *Judulang* v. *Holder*, No. 10-694 (to be argued Oct. 12, 2011) (presenting question whether alien meets threshold eligibility criteria for discretionary relief under former 8 U.S.C. 1182(c), one of Section 1229b(a)'s predecessors); *Carachuri-Rosendo* v. *Holder*, 130 S. Ct. 2577 (2010) (examining whether alien's criminal acts constituted an aggravated felony rendering him ineligible for discretionary cancellation of removal under Section 1229b(a)). Although *Judulang* and *Carachuri-Rosendo* arose from petitions by aliens from decisions restricting eligibility for discretionary relief, the identity of the petitioner should not matter, especially where (as here) a circuit conflict exists. Indeed, these cases are no less worthy of further review from the perspective of aliens outside the Ninth Circuit for whom imputation is not available to satisfy Section 1229b(a)'s eligibility requirements.

* * *

For the foregoing reasons and those stated in the petitions for a writ of certiorari, the petitions should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

SEPTEMBER 2011

JOINT APPENDIX

No. 10-1542

In the Supreme Court of the United States

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
PETITIONER

v.

CARLOS MARTINEZ GUTIERREZ

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: JUNE 23, 2011
CERTIORARI GRANTED: SEPT. 27, 2011

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 08-70436

CARLOS MARTINEZ GUTIERREZ, ET AL.

v.

ERIC H. HOLDER, JR.

Filed: Feb. 1, 2008

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
2/1/08	1	**FILED INS Petition for rev and Motion for Stay. Docketed Cause and Entered Appearance of Counsel. Pursuant to G.O. 6.4(c)(1)(3) A TEMPORARY STAY OF REMOVAL IS IN EFFECT pending further order. The schedule is set as follows: Pursuant to G.O. 6.4(c)(1)(3), the schedule is set as follows: Cert. Admin. Record due 3/28/08 Response to motion for stay due 4/25/08 for Mi-**

DATE	DOCKET NUMBER	PROCEEDINGS
		chael B. Mukasey. (MOATT) [08-70436] (XX)
2/1/08	2	Filed Petitioner Carlos Martinez Gutierrez's motion to stay deportation (see schedule above) [08-70436] served on 1/31/08 [6416880]. (MOATT) [08-70436] (XX)
2/1/08	3	Detained: No. [08-70436] (XX)
2/1/08	4	Verified that Petitioner's counsel of record has been admitted to practice in this court. [08-70436] (XX)
2/12/08	5	Filed notice of appearance of Daniel E. Goldman & Andrew B. Insenga (Withdrew as counsel: attorney OIL for Michael B. Mukasey) [08-70436] (AF)
3/27/08	6	Electronic Certified Administrative Record Filed. Number of Disks (CD-ROMs or DVDs): 1. (KS)
4/25/08	7	Filed Respondent Michael B. Mukasey response opposing Appellant Motion to stay re-

DATE	DOCKET NUMBER	PROCEEDINGS
		moval. Served on 04/24/2008. (CW)
8/15/08	8	Filed order (WILLIAM C. CANBY and EDWARD LEAVY) The motion for a stay of removal is granted. The certified administrative record has been filed. The opening brief is due November 17, 2008; the answering brief is due January 16, 2009; and the optional reply brief is due within 14 days after service of the answering brief. (BJB)
11/12/08	9	14 day oral extension of time granted to petitioner Carlos Martinez Gutierrez. The opening brief is due 12/1/08; the answering brief is due 1/30/09; and the optional reply brief is due 14 days after service of the answering brief. (LB)
11/24/08	10	Filed original and 15 copies of Petitioner Carlos Martinez Gutierrez (Informal: No) opening brief of 29

DATE	DOCKET NUMBER	PROCEEDINGS
		pages. Served on 11/21/2008. (PK)
1/8/09	11	Filed (ECF) notice of appearance of Thankful T. Vanderstar for Respondent Michael B. Mukasey. Date of service: 01/08/2009. [6761082] (TTV)
1/8/09	12	Added attorney Thankful Townsend Vanderstar for Michael B. Mukasey, in case 08-70436. (CW)
1/8/09	13	Filed (ECF) Respondent Michael B. Mukasey Unopposed Motion for miscellaneous relief [Suspension Of Briefing Schedule and Abeyance Of Proceedings]. Date of service: 01/08/2009. [6761911] (TTV)
1/12/09	14	Filed clerk order (Deputy Clerk:TAH): The respondent's motion to stay appellate proceedings pending the court's disposition of Escobar, et al., v. Mukasey, case No. 07-72843, or Mercado-Zazueta v. Mukasey, case

DATE	DOCKET NUMBER	PROCEEDINGS
		No. 07-71428 is granted. This case is stayed until March 9, 2009. At or prior to the expiration of the stay, the respondent shall file the answering brief or a motion for appropriate relief. If the answering brief is filed, the optional reply brief shall be due 14 days after service of the answering brief. (SC)
3/5/09	15	Filed (ECF) Respondent Eric H. Holder, Jr. Unopposed Motion for miscellaneous relief [Continued Suspension Of Briefing Schedule And Abeyance Of Proceedings]. Date of service: 03/05/2009. [6833175] (TTV)
3/20/09	16	Filed clerk order (Deputy Clerk: TAH): The respondent's motion to further stay appellate proceedings pending the court's disposition of Escobar, et al., v. Mukasey, case No. 07-72843, or Mercado-Zazueta v. Mukasey, case No. 07-71428 is granted. This case is stayed

DATE	DOCKET NUMBER	PROCEEDINGS
		until June 12, 2009. At or prior to the expiration of the stay, the respondent shall file the answering brief or a motion for appropriate relief. If the answering brief is filed, the optional reply brief shall be due 14 days after service of the answering brief. The filing of the answering brief or the failure to file a further motion will terminate the stay. The respondent is again reminded that all motions filed in petitions for review of a decision of the Board of Immigration Appeals should provide petitioner's detention status. 9th Cir. R. 27-8.2. (BJB)
3/20/09	17	Deleted Incorrect Docket Entry (erroneously docketed in case No. 08-70436) (BJB)
6/9/09	18	Filed (ECF) Respondent Eric H. Holder, Jr. Unopposed Motion for miscellaneous relief [For Continued Suspension Of Briefing Schedule And Abeyance Of

DATE	DOCKET NUMBER	PROCEEDINGS
		Proceedings]. · Date of service: 06/09/2009. [6949569] (TTV)
6/10/09	19	Filed clerk order (Deputy Clerk: TAH): The respondent's motion to further stay appellate proceedings pending the court's disposition of Escobar, et al., v. Mukasey, case No. 07-72843, or Mercado-Zazueta v. Mukasey, case No. 07-71428 is granted. This case is stayed until September 14, 2009. At or prior to the expiration of the stay, the respondent shall file the answering brief or a motion for appropriate relief. If the answering brief is filed, the optional reply brief shall be due 14 days after service of the answering brief. The filing of the answering brief or the failure to file a further motion will terminate the stay. (WL)

DATE	DOCKET NUMBER	PROCEEDINGS
9/10/09	20	Filed (ECF) Respondent Eric H. Holder, Jr. Unopposed Motion for miscellaneous relief [Respondent's Unopposed Motion For Continued Suspension Of Briefing Schedule And Abeyance Of Proceedings]. Date of service: 09/10/2009. [7056675] (TTV)
9/14/09	21	Filed clerk order (Deputy Clerk: TAH) The respondent's motion to further stay appellate proceedings pending the government's determination whether to seek further review of Mercado-Zazueta v. Mukasey, [580] F.3d [1102], 2009 WL [__] (Sept. 8, 2009) is granted. This case is stayed until November 6, 2009. At or prior to the expiration of the stay, the respondent shall file the answering brief or a motion for appropriate relief. If the answering brief is filed, the optional reply brief shall be due 14 days after service of

DATE	DOCKET NUMBER	PROCEEDINGS
		the answering brief. [7060160] (KKW)
11/6/09	22	Filed (ECF) Respondent Eric H. Holder, Jr. Unopposed Motion for miscellaneous relief [For Continued Suspension Of Briefing Schedule And Abeyance Of Proceedings]. Date of service: 11/06/2009. [7121451] (TTV)
11/6/09	23	Filed clerk order (Deputy Clerk:TAH): The respondent's motion to further stay appellate proceedings pending the court's disposition of the pending petition for rehearing in Mercado-Zazueta v. Holder, 580 F.3d 1102 (9th Cir. 2009), is granted. This case is stayed until January 22, 2010. At or prior to the expiration of the stay, the respondent shall file the answering brief or a motion for appropriate relief. If the answering brief is filed, the optional reply brief shall be due 14 days after service of

DATE	DOCKET NUMBER	PROCEEDINGS
		the answering brief. The filing of the answering brief or the failure to file a further motion will terminate the stay. [7122155] (BJB)
1/21/10	24	Filed (ECF) Respondent Eric H. Holder, Jr. Unopposed Motion for miscellaneous relief [Motion For Continued Suspension Of Briefing Schedule And Abeyance Of Proceedings]. Date of service: 01/21/2010. [7202070] (TTV)
1/22/10	25	Filed clerk order (Deputy Clerk: TAH): The respondent's motion to further stay appellate proceedings pending the court's disposition of the pending petition for rehearing in Mercado-Zazueta v. Holder, 580 F.3d 1102 (9th Cir. 2009), is granted. This case is stayed until March 22, 2010. At or prior to the expiration of the stay, the respondent shall file the answering brief or a motion for appropriate relief. If the

DATE	DOCKET NUMBER	PROCEEDINGS
		answering brief is filed, the optional reply brief shall be due 14 days after service of the answering brief. The filing of the answering brief or the failure to file a further motion will terminate the stay. [7204033] (BJB)
3/15/10	26	Filed (ECF) Respondent Eric H. Holder, Jr. Unopposed Motion for miscellaneous relief [Continued Suspension Of Briefing Schedule And Abeyance Of Proceedings]. Date of service: 03/15/2010. [7264821] (TTV)
3/17/10	27	Filed clerk order (Deputy Clerk: TAH): The respondent's motion to further stay appellate proceedings pending the court's disposition of the pending petition for rehearing in Mercado-Zazueta v. Holder, 580 F.3d 1102 (9th Cir. 2009), is granted. This case is stayed until May 28, 2010. At or prior to the expiration of the stay, the respondent shall file the an-

DATE	DOCKET NUMBER	PROCEEDINGS
		swering brief or a motion for appropriate relief. If the answering brief is filed, the optional reply brief shall be due 14 days after service of the answering brief. The filing of the answering brief or the failure to file a further motion will terminate the stay. [7268622] (SC)
5/27/10	28	Filed (ECF) Respondent Eric H. Holder, Jr. Unopposed Motion to stay proceedings, Motion for miscellaneous relief [Continued Suspension of Briefing Schedule]. Date of service: 05/27/2010. [7351564] (TTV)
5/27/10	29	Filed (ECF) Respondent Eric H. Holder, Jr. Amended Motion to stay proceedings, Motion for miscellaneous relief [Continued Suspension Of Briefing Schedule]. Date of service: 05/27/2010. [7352026] (TTV)

DATE	DOCKET NUMBER	PROCEEDINGS
5/28/10	30	Filed clerk order (Deputy Clerk: TAH): The respondent's motion to further stay appellate proceedings pending the court's disposition of the pending petition for rehearing in Mercado-Zazueta v. Holder, 580 F.3d 1102 (9th Cir. 2009), is granted. This case is stayed until July 30, 2010. At or prior to the expiration of the stay, the respondent shall file the answering brief or a motion for appropriate relief. If the answering brief is filed, the optional reply brief shall be due 14 days after service of the answering brief. The filing of the answering brief or the failure to file a further motion will terminate the stay. This order was issued prior to the expiration of time within which a response may be filed. Fed. R. App. P. 27(b). [7353272] (BJB)

DATE	DOCKET NUMBER	PROCEEDINGS
7/29/10	31	Submitted (ECF) Answering brief for review. Submitted by Respondent Eric H. Holder, Jr.. Date of service: 07/29/2010. [7421486] (TTV)
7/29/10	32	Filed clerk order: The answering brief submitted by Eric H. Holder, Jr. is filed. Within 7 days of the filing of this order, filer is ordered to file 7 copies of the brief in paper format, with a red cover, accompanied by certification, attached to the end of each copy of the brief, that the brief is identical to the version submitted electronically. [7421896] (PK)
8/4/10	33	Received 7 paper copies of Answering brief filed by Eric H. Holder, Jr. [7429217] (SD)
10/8/10	34	Filed order MEDIATION (CLR): This immigration petition has been referred to the Mediation Program. The court has scheduled a telephone assessment confer-

DATE	DOCKET NUMBER	PROCEEDINGS
		ence, with counsel only, on November 15, 2010, at 11:00 a.m. Pacific Time to discuss whether your client's [7502556] (AF)
11/1/10	35	Filed order MEDIATION (CLR): The assessment conference previously scheduled for November 15, 2010, is canceled. This case is not selected for inclusion in the Mediation Program. All further inquiries shall be directed to the Clerk's Office. [7530239] (BJB)
1/24/11	36	FILED MEMORANDUM (ROBERT R. BEEZER, RICHARD C. TALLMAN and CONSUELO M. CALLAHAN) GRANTED; REMANDED. FILED AND ENTERED JUDGMENT. [7621659] (DT)
3/18/11	37	MANDATE ISSUED. (RRB, RCT and CMC) [7686695] (SW)

DATE	DOCKET NUMBER	PROCEEDINGS
4/22/11	38	Received letter from the Supreme Court dated 04/18/2011 regarding The application for an ext. of time to file a petition for writ of certiorari has been granted to and including 5/24/2011. [7728850] (LC)
5/23/11	39	Received letter from the Supreme Court dated 05/17/2011 regarding the extension of time to file a writ of certiorari is granted until June 23, 2011. [7761668] (SW)
6/27/11	40	Received notice from the Supreme Court: petition for certiorari filed on 06/23/2011. Supreme Court Number 10-1542. [7798848] (SW)
9/27/11	41	Received notice from the Supreme Court. Petition for certiorari GRANTED on 09/27/2011. Supreme Court Number 10-1542. [7907534] (SW)

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT

File A 78 463 557

MATTER OF CARLOS MARTINEZ GUTIERREZ,
RESPONDENT

Filed: Dec. 29, 2005
San Diego, California

TRANSCRIPT OF HEARING

Before: ZSA ZSA C. DEPAOLO, Immigration Judge,

[128]

JUDGE FOR THE RECORD

This is an initial Master Calendar hearing being held at the United States Immigration Court at the East Mesa Detention Facility in San Diego, California. This is Immigration Judge Zsa Zsa DePaolo. Today's Thursday morning, December 29, 2005. This is case A 78 463 557, in the matter of Carlos Martinez Gutierrez.

JUDGE TO MR. MARTINEZ

Q. Mr. Martinez, is that your true and correct name?

A. Yes.

Q. Thank you.

JUDGE FOR THE RECORD

That's C A R L O S M A R T I N E Z G U T I E R R E Z. Mr. Martinez is represented by counsel, Mr. Edward Orendain, that's O R E N D A I N. Appearing on behalf of the Department of Homeland Security is Assistant District Counsel, Tracy Cody, that T RA C Y C O D Y. Mr. Martinez does speak English, so these proceedings are being conducted in the English language. All right. Okay.

JUDGE TO MR. ORENDAIN

Mr. Orendain, have you, have you had an opportunity to review the Notice to Appear with Mr. Martinez?

MR. ORENDAIN TO JUDGE

I have, Your Honor.

JUDGE TO MR. ORENDAIN

Okay. Are you waiving a reading of each of the factual [129] allegations and an explanation of the legal charge to him by me?

MR. ORENDAIN TO JUDGE

Yes, Ma'am.

JUDGE TO MR. ORENDAIN

Are you also waiving a complete explanation to him of all of his rights and his remedies in removal proceedings?

MR. ORENDAIN TO JUDGE

Waived, Your Honor.

JUDGE TO MR. ORENDAIN

All right. Let's see. We've got a record of Master Calendar appearance form admitting certain allegations, denying others. All right.

JUDGE TO MR. MARTINEZ

Q. Mr. Martinez, you're admitting certain things today. I'm just going to read you, with you what you're admitting, okay.

A. Okay.

Q. You're admitting that you are a native and a citizen of Mexico, and that you are not a citizen or national of the United States. Do you understand that?

A. Yes.

Q. All right. You're also admitting that you are log, a legal permanent resident, and that you came into the port of entry at San Ysidro from Mexico on December 2nd, earlier this month, and on that date you did show Immigration officers that you are a legal resident. Do you understand that?

[130]

A. Yes.

Q. Okay.

JUDGE TO MS. CODY

Do we have a date on legal resident status?

MS. CODY TO JUDGE

October 28, 2003.

JUDGE TO MS. CODY

October 28, '03. Okay. All right.

JUDGE TO MR. MARTINEZ

Q. Mr. Martinez, you are denying all of the other allegations of fact and of, of which there are three. All three of those allegations relate to single individuals who the Immigration officers claim you were attempting to bring into the United States on December 2nd, knowing that they did not have proper documents or authorization to enter the United States. So, those are the, the factual allegations and the legal charge that you are going to contest here in court. Do you understand that?

A. Yes.

Q. All right.

JUDGE TO MR. ORENDAIN

So, let's see.

MR. ORENDAIN TO JUDGE

Your Honor, if I may?

JUDGE TO MR. ORENDAIN

[131]

Go ahead.

MR. ORENDAIN TO JUDGE

There is also an issue of if the Government is able to prove their, their allegations and the charges on the Notice to Appear whether he is eligible for cancellation of removal on, for certain lawful permanent residents under the *Cuevas-Gaspar* case.

JUDGE TO MR. ORENDAIN

Um-hum.

MR. ORENDAIN TO JUDGE

So, that's why, in the alternative, I have put down on the record of Master Calendar cancellation of removal under 240A(a).

JUDGE TO MR. ORENDAIN

Okay.

MR. ORENDAIN TO JUDGE

I don't know if Your Honor wants to have a hearing on those, on the eligibility for relief separate from and before the merits hearing, or do you want us just to brief the issue, both sides, and Your Honor make the call. Whatever's best for the Court.

JUDGE TO MR. ORENDAIN

Do you know the facts that you have is the factual basis for claiming eligibility for relief?

MR. ORENDA IN TO JUDGE

Yes. His father became a lawful permanent resident in 1997, I believe.

JUDGE TO MR. ORENDAIN

[132]

Okay.

MR. ORENDAIN TO JUDGE

And at that time, my client was a minor. We have been working with the Government trying to get him a

parole for bond, and they've tentatively agreed that he has a seven, but they're not willing to make the same, the same leap of faith, so, so to speak, as, as to imputing the parent's status when it comes to the lawful permanent resident issue. They're saying that it works for the seven years, but doesn't work for the five years as an LPR. And we're saying it works both ways because under *Cuevas-Gaspar*, when he committed the offense and pled guilty, he didn't have the five years as a lawful permanent resident either.

JUDGE TO MR. ORENDAIN

Yeah. Well, that's the whole issue.

MR. ORENDAIN TO JUDGE

Right.

JUDGE TO MR. ORENDAIN

Have you given them a copy of the case?

MR. ORENDAIN TO JUDGE

We have, and they're and, and the deportation officer's still saying that no, it doesn't work for the five years. It only—

* * * * *

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT

File A 78 463 557

MATTER OF CARLOS MARTINEZ GUTIERREZ,
RESPONDENT

Filed: Feb. 3, 2006
San Diego, California

TRANSCRIPT OF HEARING

Before: ZSA ZSA C. DEPAOLO, Immigration Judge,

[142]

JUDGE FOR THE RECORD

This is a continuation of case number A 78 463 557, in the matter of Carlos Martinez Gutierrez. Mr. Martinez Gutierrez is seated in the courtroom. He does speak English, so these proceedings are being conducted in the English language.

JUDGE TO MR. MARTINEZ

Q. Good morning.

A. Morn.

JUDGE FOR THE RECORD

Mr. Martinez is represented by counsel, Mr. Ed Orendain. Appearing on behalf of the Department of Homeland Security is Assistant District Counsel, Kerri Harlin. This is Immigration Judge Zsa Zsa DePaolo. We are at the United States Immigration Court at the East Mesa Detention Facility in San Diego, California. Today is Friday morning, February 3, 2006. All right.

JUDGE TO MR. ORENDAIN

Mr. Orendain, I have a record of Master Calendar form indicating that you are entering a plea today admitting allegations of fact, conceding removal. Correct?

MR. ORENDAIN TO JUDGE

Correct, Your Honor.

JUDGE TO MR. ORENDAIN

Okay. All right.

JUDGE TO MR. MARTINEZ

[143]

Q. Mr. Martinez, I'm going to review the plea with you, okay, before we talk about relief. So, let me just go through this, okay. You're admitting that you are a native and a citizen of Mexico, and that you are not a citizen or a national of the United States. Do you understand that?

A. Yes.

Q. Okay. Now, we know you're a legal resident, at least with respect to your own legal resident status. You have been a legal resident since October 28, 2003. Okay.

And the Notice to Appear says that you came into the port of entry at San Ysidro from Mexico on December 2, 2005, and you provided the Immigration officers with your legal permanent resident card. Do you understand that?

A. Yes.

Q. Okay. Now, it looks like we've got a December 2, 2005 inspection, and Immigration officers were able to determine that you were with three children on December 2, 2005 who you intended to bring into the United States even though you knew that they did not have legal documents to enter or remain in the United States. Okay. Is that true? All right. This is an alien smuggling charge, Mr. Martinez, and you can be deported from the United States even if you're a legal resident if you're involved in alien smuggling. Do you understand that?

A. Yes.

Q. Okay. Now, as I understand, you do have a father who is [144] a legal permanent resident, correct?

A. Correct.

Q. Okay.

JUDGE TO MR. ORENDAIN

And, Mr. Orendain, you indicated he's been an LPR since '97?

MR. ORENDAIN TO JUDGE

'91, Your Honor.

JUDGE TO MR. ORENDAIN

'91.

MR. ORENDAIN TO JUDGE

I, I have a copy of his permanent resident card that I believe is part of our cancellation application.

JUDGE TO MR. ORENDAIN

Okay.

MR. ORENDAIN TO JUDGE

And it states, kind of blurry, but I think it says February 7, 1991.

JUDGE TO MR. ORENDAIN

Okay.

MR. ORENDAIN TO JUDGE

Respondent was born in '83, so he was approximately eight years old when the father became a resident.

JUDGE TO MR. ORENDAIN

Okay. All right.

* * * * *

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

File A 78 463 557

MATTER OF CARLOS MARTINEZ GUTIERREZ,
RESPONDENT

Filed: Mar. 1, 2006
San Diego, California

TRANSCRIPT OF HEARING

Before: ZSA ZSA C. DEPAOLO, Immigration Judge,

[155]

JUDGE FOR THE RECORD

This is a continuation of case number A 78 463 557, in the matter of Carlos Martinez Gutierrez. Mr. Martinez Gutierrez is seated in the courtroom.

JUDGE TO MR. MARTINEZ

Q. Good morning.

A. Morning.

JUDGE FOR THE RECORD

Mr. Martinez is represented by counsel this morning. Appearing on his behalf is Mr. Edward Orendain. Appearing on behalf of the Department of Homeland Secu-

rity is Assistant District Counsel, Kerri Harlin. This is Immigration Judge Zsa Zsa DePaolo. We are at the United States Immigration Court at the East Mesa Detention Facility in San Diego, California. Today is Wednesday morning, March 1, 2006. All right. Mr. Martinez does speak English, and I believe his testimony will be done in the English language. But we have an interpreter available for any witnesses who may be doing the case in Spanish.

MR. ORENDAIN TO JUDGE

Thank you, Your Honor.

JUDGE TO MR. ORENDAIN

Correct? Okay. Great. All right.

JUDGE FOR THE RECORD

Let me mark everything into the record, and then we'll talk about issues. Okay. All right. Obviously, the Notice to Appear [156] is Exhibit No.1. Mr. Martinez had admitted that he is a native and a citizen of Mexico, that he is not a citizen or national of the United States, that he made an application for admission to the United States on December 2, 2005 at the San Ysidro port of entry, and provided proof of his lawful permanent resident status. He has also admitted that on December 2, 2005 that he was attempting to bring at least three children into the United States from Mexico knowing that they were undocumented Mexican nationals. Based on the admissions that have been made to the record, I have made a specific finding that Mr. Martinez is subject to deportation and removal from the United States for alien smuggling.

JUDGE TO MR. MARTINEZ

Q. Do you understand that, Mr. Martinez?

A. Yes.

* * * * *

[164]

* * * * *

JUDGE TO MR. MARTINEZ

Q. Mr. Martinez, I'm going to ask you if you would please stand and raise your right hand so I can swear you in. Do you swear that the testimony you give here this morning will be the truth and nothing but the truth?

A. Yes.

Q. Thank you. Have a seat. All right. Mr. Martinez, Mr. Orendain is going to start the questioning. When he is finished, Ms. Harlin will follow. In making a decision on your case, obviously we have this legal issue that has to do with how long you've been a legal resident, how long you've been living in the United States. Aside from that issue, the cancellation application, if you meet all of the eligibility requirements, which I find that you do today, then I balance all the positive things about your time in the United States versus the negative. Right now, we know the negative are the alien smuggling charge. And in balancing those, if I find that it is in the best interest of the United States, I can grant the application. If I find [165] that it is not in the best interest of the United States that you remain here, then I can deny the application.

A. Okay.

Q. Do you understand that?

A. Yes.

Q. Do you have any questions before we begin?

A. Nothing. No.

Q. Okay. I'm going to ask you to keep your voice up so everyone—

A. Okay.

Q. —can hear you because we have air ducts and sometimes it's a little hard to hear.

A. Okay.

Q. Okay.

A. Yeah.

Q. All right .

JUDGE TO MR. ORENDAIN

Mr. Orendain.

MR. ORENDAIN TO JUDGE

Thank Your Honor.

MR. ORENDA IN TO MR. MARTINEZ

Q. Good morning, sir. How are you?

A. Good. How are you?

Q. I'm doing well, thank you. May I have your true and complete name, please?

[166]

A. Carlos Martinez Gutierrez.

Q. Sir, and where were you born?

A. Tecama, Mexico.

Q. And where is Tecama? Do you know what state that is in Mexico?

A. Mexico City.

Q. Oh, oh, it's near Mexico City?

A. Yeah. Near Mexico City.

Q. Okay. And—

JUDGE FOR THE RECORD

How do you spell Tecama? It's T E C A M A.

JUDGE TO MR. ORENDAIN

Go ahead.

MR. ORENDAIN TO JUDGE

Thank Your Honor.

MR. ORENDAIN TO MR. MARTINEZ

Q. Your date of birth, sir, please?

A. November 4, 1983.

Q. How old does that make you today, sir?

A. Twenty-two.

Q. And prior to being detained here at this detention facility, where were you living at, sir?

A. 2644 Sturla Drive. That's in San Jose, California.

JUDGE FOR THE RECORD

Stuertland is S T U E R T L A N D.

[167]

MR. ORENDAIN TO JUDGE

I'm sorry, Your Honor. There was a correction

JUDGE TO MR. ORENDAIN

Oh.

MR. ORENDAIN TO JUDGE

—that respondent informed me of. It's actually Sturla, it's S TU R L A. We misspelled it on the application.

JUDGE TO MR. ORENDAIN

S T U—

MR. ORENDAIN TO JUDGE

R L A.

JUDGE TO MR. ORENDAIN

Sturla. Okay. Great.

MR. ORENDAIN TO JUDGE

Sturla, yes.

MR. ORENDAIN TO MR. MARTINEZ

Q. And San Jose is up in northern California, is that correct, sir?

A. Correct.

Q. And how long have you been living in the northern California area?

A. Since I was probably five, five years old.

Q. Is that your earliest recollection of living anywhere else?

A. Yeah, other than Mexico.

[168]

Q. Do you remember living in Mexico?

A. Not really.

Q. Do you recall how old you were when you first came to United States?

A. Five years old.

Q. Okay. And if you know, at that time when you entered at five, did you have lawful permission to enter United States?

A. No.

Q. Did you ever gain lawful permission to live or work in United States?

A. Till was it 2003.

Q. And how was it that you, what was it that you got?

A. Well, I got the, went through the double processing in the work, work authorization and I, I had that a couple years. Then I had the permanent residence.

Q. So, you're a lawful permanent resident?

A. Um-hum.

Q. Okay.

A. Yes.

Q. And have you ever gone to school in Mexico?

A. Not that I remember.

Q. Do you remember going to kindergarten here in the United States?

A. Yes. My whole schooling's been here.

Q. And what school did you go to kindergarten at?

[169]

A. Went Slater Elementary. It's in Mountain View, California.

JUDGE TO MR. MARTINEZ

Q. S L A T T E R?

A. S L AT E R.

Q. Okay.

MR. ORENDAIN TO MR. MARTINEZ

Q. And that was, you said, in Mountain View?

A. Yes.

Q. And what was your last year that you completed in your education?

A. Went to all the way to high school, graduated from high school.

Q. Okay. Did you have any other studies after high school?

A. Yeah. I took a massage therapist course.

Q. Did you finish that?

A. Yes.

Q. Did you have a certificate from there?

A. Well, na, because the thing is that happened I went through all the paperwork for my loan, at the end of it everything was fine. The exit, exiting papers, they said my loan never went through because I guess the lady in charge of that put in the computer that I wasn't attending school, that I was suppose to attend like the year after that.

Q. Okay.

[170]

A. So, never really got, got anything with that.

Q. And prior to you being detained, were you employed?

A. Yes.

Q. And where were you employed, sir?

A. Costco Wholesale, Santa Clara.

Q. How long were you working for Costco?

A. Costco, worked there since June 2004.

Q. And were you working full-time or part-time?

A. Well, I was stated as part-time, but I got 40, 40, 45 hours a week.

Q. Okay.

A. So,—

Q. And who were you living with at the time when you were working at Costco?

A. With my parents.

Q. So, it's you and your parents.

A. Uh-huh.

Q. Anybody else in your home?

A. My sister and my little brother, my younger brother.

Q. And at the time when you were detained, was your father working?

A. No.

Q. And do you know why he was not working?

A. Well, years, couple years back he, he hurt his back, so he was on a worker's comp. I'm not sure he was getting any money [171] or not, but, yeah, I think he was going some, some sort of classes.

Q. So, do you remember when was the last time your father was able to work?

A. Na. No. I can't, can't recall year or date.

Q. And your mom, was she working when you were, at the time that you were detained?

A. No.

Q. Do you know if she's working now?

A. Yes, she is.

Q. Do you know where she's working at?

A. Think's working at a clothing store, clothes warehouse. I think's called Factory to You, something like that.

Q. Okay. And how old is your little brother?

A. Brother? He's 14.

Q. So, obviously he's not working, correct?

A. No.

Q. And your sister, does she work?

A. My sister, yeah, she's working.

Q. Where does she work?

A. I'm not sure. Dry cleaner's I think, something like that.

Q. Are you married?

A. No.

Q. Do you have any children?

[172]

A. No.

Q. Now, when you were working, were you contributing to your household?

A. Yes.

Q. In what way, sir?

A. I was giving money to my mom that she would just pay bills or whatever, pay my bills, just help around the house what, whichever way I can.

Q. Aside from your income and I guess your sister's income, was there any other income to the family?

A. No.

Q. We, we'll talk about the incident in the border in a little bit.

A. Okay.

Q. But before that incident, had you ever been arrested for any reason?

A. Back in 2001 I was arrested for possession of stolen property.

Q. Okay. And did you go to court or did you plead guilty to anything on that?

A. Well, I went to court, and this thing is, well, I pled guilty to possession of the things. The thing it was, it happen at school. We're working with the district. I used to work in the warehouse, and some people that worked in the office, the actual off, district office stole credit cards, which I wasn't * * *

* * * * *

[175]

* * * * *

Q. And if you remember, if you know, was it a misdemeanor or a felony?

A. It's a misdemeanor.

Q. Aside from that arrest, do you have any other arrest for any other reason?

A. No.

Q. Any other convictions for any other reason?

A. No.

Q. Okay. Now, let's talk about the incident that brought you here.

A. Um-hum.

Q. —today. You do realize that the Government has asked this Court to deport you from the United States, right?

A. Yes.

Q. And do you know why they're asking that?

A. For the alien smuggling.

Q. Okay. And do you recall when this whole incident began?

A. December 2nd.

Q. Okay. And it states here on the Notice to Appear that you presented yourself at the port of entry at the border.

A. Um-hum.

Q. Right. And you were driving the vehicle, is that correct?

A. Yes.

[176]

Q. And whose vehicle was that?

A. Oh, I rented a vehicle.

Q. Okay.

A. Um-hum.

Q. But you were driving?

A. Yeah.

Q. Who else was in the vehicle with you, sir?

A. The children and my mom.

A. How many children?

A. Three children.

Q. Were these your children?

A. No.

Q. Who were they?

A. Just of a friend of mine.

Q. They were children of a friend of yours?

A. Yes.

Q. And this friend, how do you know him or her?

A. Well, she, she was living with my, with my girl, at my girlfriend.

Q. And where was this?

A. Same, they were renting in same house.

Q. Where was this?

A. In San Jose.

Q. Okay. So, the children's mother was living in same house as your girlfriend—

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A. Yes.

Q. —in San Jose? Okay. And how was it that these three minor children of hers were in your vehicle, in the vehicle you were driving?

A. Well, the thing is like I, I told them I was going to come, come in Tijuana, right, because we, we never, I never left the, left the, the state because I got here. So, we want to, you know, just see like, you know, lot of people let, tell you about them, talk about it. So, we're coming down, and she's, she's to, what, like later on that, later on that week she started telling me the situation about her kids and stuff. And so, I too, you know, I felt, felt sorry, you know, four years without their parents, and they're practically living with, with no one back, down in Mexico, just with the grandpa, but the grandpa's like, like 70 years old. He's practically never home. And I, know, I felt sorry, but I didn't say anything. Then she's the one that brought it up. She's like do you think you, you can do some for me. I'm like, like I don't know. I said here, if your dad can, can bring them over, over here, I'm going like, I'm like I'm just going to Tijuana and coming back. I ain't going no where else. I just want to go see, see that, that one place over where they sell pottery they told me about, which I never got to. But it's a, I said if, if he can make it to Tijuana by then because I told her like I'm leaving like in two weeks or, or, or probably like three weeks. She, then she didn't never said anything. Then [178] like probably like a week, a week before I, I, like that same week I was leaving, she told me my, my, my father's going to be in Tijuana about, around, around Wednesday or Thursday night. Excuse me, Thursday night. I said, and I was like oh, I'm like okay. And I, that's when I, that's when I said okay, I'll, I'll, I'll see what I can do.

Q. So, you decided to help her at that poi[illegible]?

A. Yeah.

Q. Okay. And how was it that these young people were going to cross into United States?

A. Well, I, one with my brother and I either told them let me borrow the birth certificates of my nephews.

Q. So, you borrowed your nephews' birth certificates to try and cross these three young people to United States?

A. Yes.

Q. And you knew that was illegal, correct?

A. Yes.

Q. Now, how do you know for a fact that these three children are the minor children of this lady that you were talking to?

A. So, so, I didn't know. I just, I just like one was, I took her word about for it. You know, I just thought about the situation they were living in, what she told me that, you know, four years with her parents and she was over here. The kids, you know, she didn't even know they were go, attending school or not, * * *

* * * * *

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* * * * *

MR. ORENDAIN TO JUDGE

Thank Your Honor.

MR. ORENDAIN TO MR. MARTINEZ

Q. Your 22 now, you said, right?

A. Yes.

Q. So, you came in when you were about five years old, you said?

A. Five years old, yeah.

Q. So, that's 17 years that you've been in the United States?

A. Correct.

Q. How's your Spanish?

A. Say pretty good. Pretty much my house we speak fluent Spanish.

Q. Okay. In addition to your mother and your father—

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A. Um-hum.

Q. —your sister and your younger brother, do you have any other family members in the United States?

A. Just probably cousins, more cousins on my, from my dad's side.

Q. How about nieces and nephews?

A. Yeah.

Q. How many?

A. About, see, about six, seven. I don't know.

Q. And where were they born?

A. They're born here, United states.

Q. Okay. You have any family back in Mexico?

A. Probably just, probably just one or two aunts. Haven't seen them for, since what, since I came here, over here.

Q. That's another question I wanted to ask you. This time that you left in December of 2005, was that the first time you had left the United States since coming at age five?

A. Correct.

Q. At any time after you got caught and, you know, were taken to secondary, at any time did you confess to the officers that these were not your nephews?

A. Yes.

Q. At what time? At what point was that?

A. Well, right when they separated us. The, I start, he, he start, we started talking. At, I said okay. Well, I, I told * * *

* * * * *

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* * * * *

Q. And she has to make a decision whether it's better for society to keep you here or to send you back to Mexico.

A. Um-hum.

Q. Why is it so important for you to remain in the United States?

A. Well, my whole life's been here. My, my schooling, everything. My family don't have, pretty much, I guess you could—I have aunts, but aunts haven't seen, what, 17 year, 18, 17 years, don't really have any contact with them. Don't have anything in Mexico to look forward. Like, like I was talking to my, my mom. They's like we could go. She said if I get deported I'm like I'll see what I do down there. I'm like because I ain't coming back. But she's pretty much, I don't know my, if I, I don't know my future from here. My whole, pretty much, I, I, I want to stay here, you know, which, have a family, have a future here because this is where my, my whole life's been.

Q. Now, you, you and I talked about this case before

A. Um-hum.

Q. —today, correct?

A. Yeah.

Q. You are aware that if the Judge does grant you this relief, you can only get it once? You understand that?

A. Yes.

* * * * *

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* * * * *

* * * why it might be important to keep your legal resident card and why being a legal resident has some meaning for you?

A. A lot.

Q. Well, try and verbalize that.

A. Well, if I lose this, I would lose pretty much everything.

Q. Um-hum.

A. I have to go like, it's like just throwing me out in the, in, just out in the streets, you know. I don't have no, I don't have no where, no where to start or where to go. Here, well, as pretty much my whole life's been here. My whole schooling, everything. I pretty much, I, I don't know, I don't know or like never been anywhere else and, then here. Pretty much it's—

Q. The time—

A. —why—

Q. —to think about all that is before you break the law, not afterwards.

A. Um-hum.

Q. Okay.

JUDGE FOR THE RECORD

I don't have anything else to say.

* * * * *

PETITIONER'S BRIEF

Nos. 10-1542 and 10-1543

In the Supreme Court of the United States

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
PETITIONER

v.

CARLOS MARTINEZ GUTIERREZ

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
PETITIONER

v.

DAMIEN ANTONIO SAWYERS

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether a parent's years of lawful permanent resident status can be imputed to an alien who resided with that parent as an unemancipated minor, for the purpose of satisfying 8 U.S.C. 1229b(a)(1)'s requirement that the alien seeking cancellation of removal have "been an alien lawfully admitted for permanent residence for not less than 5 years."

2. Whether a parent's years of residence after lawful admission can be imputed to an alien who resided with that parent as an unemancipated minor, for the purpose of satisfying 8 U.S.C. 1229b(a)(2)'s requirement that the alien seeking cancellation of removal have "resided in the United States continuously for 7 years after having been admitted in any status."

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Cuevas-Gaspar v. *Gonzales*, 430 F.3d 1013 (9th Cir. 2005) ..... *passim*
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De Leon-Ochoa v. *Attorney Gen. of the U.S.*, 622 F.3d 341 (3d Cir. 2010) 21, 36
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Lin-Zheng v. *Attorney Gen. of the U.S.*, 557 F.3d 147 (3d Cir. 2009) 20
Mayo Found. for Med. Educ. & Research v. *United States*, 131 S. Ct. 704 (2011) 34
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8 U.S.C. 1229b(a)(1) ..... *passim*
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8 U.S.C. 1255a (2006 & Supp. III 2009) 30, 31
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Family Unification, Employer Sanctions & Anti-Discrimination Under IRCA: Hearing Before the Subcomm. on Immigration, Refugees, and Int'l Law of the H. Comm. on the Judiciary, 100th Cong., 2d Sess. (1988) 30

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H.R. Conf. Rep. No. 828, 104th Cong., 2d Sess. (1996) ... 24

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H.R. Rep. 879, 104th Cong., 2d Sess. (1997) 24, 32

Removal of Criminal & Illegal Aliens: Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary, 104th Cong., 1st Sess., (1995) 25, 26

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Restatement (Second) of Conflict of Laws (1971) 35

United States Dep't of State, *Visa Bulletin for October 2008*, http://www.travel.state.gov/visa/bulletin/bulletin_2985.html 31

In the Supreme Court of the United States

No. 10-1542

ERIC H. HOLDER, JR., ATTORNEY GENERAL, PETITIONER

v.

CARLOS MARTINEZ GUTIERREZ

No. 10-1543

ERIC H. HOLDER, JR., ATTORNEY GENERAL, PETITIONER

v.

DAMIEN ANTONIO SAWYERS

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals in *Holder* v. *Gutierrez*, No. 10-1542 (*Gutierrez* Pet. App. 1a-2a) is unreported. The decisions of the Board of Immigration Appeals (*Gutierrez* Pet. App. 5a-6a, 12a-16a) and the immigration judge (*Gutierrez* Pet. App. 7a-9a, 17a-27a) are unreported.

The opinion of the court of appeals in *Holder* v. *Sawyers*, No. 10-1543 (*Sawyers* Pet. App. 1a-2a) is unreported. The decisions of the Board of Immigration Appeals (*Sawyers* Pet. App. 5a-8a) and the immigration judge (*Sawyers* Pet. App. 9a-15a) are unreported.

JURISDICTION

The judgment of the court of appeals in *Gutierrez* was entered on January 24, 2011. On April 18, 2011, Justice Kennedy extended the time within which to file a petition for a writ of certiorari in *Gutierrez* to May 24, 2011. On May 17, 2011, Justice Kennedy further extended the time to June 23, 2011, and the petition was filed on that date. The petition for a writ of certiorari in *Gutierrez* was granted on September 27, 2011, and the case was consolidated with *Sawyers* for oral argument. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

The judgment of the court of appeals in *Sawyers* was entered on October 14, 2010. A petition for rehearing was denied on February 1, 2011 (*Sawyers* Pet. App. 3a). On April 20, 2011, Justice Kennedy extended the time within which to file a petition for a writ of certiorari in *Sawyers* to June 1, 2011. On May 25, 2011, Justice Kennedy further extended the time to June 23, 2011, and the petition was filed on that date. The petition for a writ of certiorari in *Sawyers* was granted on September 27, 2011, and the case was consolidated with *Gutierrez* for oral argument. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-3a.

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, the Attorney General, in his discretion, may cancel the removal of an alien who is found to be removable. 8 U.S.C. 1229b (2006 & Supp. III 2009). The statute sets forth the eligibility criteria for cancellation of removal of a lawful permanent resident (LPR) alien as follows:

> (a) Cancellation of removal for certain permanent residents
>
> The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—
>
> (1) has been an alien lawfully admitted for permanent residence for not less than 5 years,
>
> (2) has resided in the United States continuously for 7 years after having been admitted in any status, and
>
> (3) has not been convicted of any aggravated felony.

8 U.S.C. 1229b(a).

The INA defines the phrase "lawfully admitted for permanent residence," as used in Subsection (a)(1), as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." 8 U.S.C. 1101(a)(20). The INA defines "residence," the noun form of the term "resided" used in Subsection (a)(2), as the alien's "principal, actual dwelling place in fact, without regard to intent." 8 U.S.C. 1101(a)(33). And the INA defines "admitted," also used in Subsection (a)(2), as "the lawful

entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. 1101(a)(13)(A). An alien may be "admitted" to the United States either at a port of entry or by adjusting his status to that of an LPR while already in the country. See *In re Alyazji*, 25 I. & N. Dec. 397, 399-400 (B.I.A. 2011); *In re Rosas-Ramirez*, 22 I. & N. Dec. 616, 619 (B.I.A. 1999).

The cancellation-of-removal statute further provides that an alien's period of continuous residence is deemed to end

> when the alien is served a notice to appear under section 1229(a) of this title, or * * * when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.

8 U.S.C. 1229b(d)(1).

To obtain cancellation of removal, the alien must demonstrate both that he is statutorily eligible for such relief and that he warrants a favorable exercise of discretion. *In re C-V-T-*, 22 I. & N. Dec. 7, 10 (B.I.A. 1998). The alien bears the burden of proof on those issues. 8 U.S.C. 1229a(c)(4)(A)(i); 8 C.F.R. 1240.8(d). The ultimate discretion of the Attorney General to grant such relief is akin to "a judge's power to suspend the execution of a sentence, or the President's to pardon a convict." *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996) (citation omitted).

2. a. In 1989, at the age of five, respondent Gutierrez, a native and citizen of Mexico, illegally entered the

United States and thereafter resided in the United States with his parents. *Gutierrez* Pet. App. 12a, 18a; *Gutierrez* J.A. 33, 47-48. In 1991, when Gutierrez was seven years old, his father obtained LPR status. *Gutierrez* Pet. App. 12a, 18a; *Gutierrez* J.A. 25, 58. In October 2003, at the age of 19, Gutierrez obtained LPR status. *Gutierrez* Pet. App. 12a-13a; *Gutierrez* J.A. 19, 47.

In December 2005, immigration officials apprehended Gutierrez at the border for alien smuggling and subsequently served and filed a Notice to Appear charging him with being inadmissible on that basis under 8 U.S.C. 1182(a)(6)(E)(i). *Gutierrez* Pet. App. 18a; *Gutierrez* J.A. 59-61. Gutierrez admitted to the facts establishing his removability but sought cancellation of removal pursuant to 8 U.S.C. 1229b(a). *Gutierrez* Pet. App. 13a, 19a; *Gutierrez* J.A. 24-25, 47-56.

In March 2006, after a hearing, an immigration judge (IJ) found Gutierrez statutorily eligible for cancellation of removal, even though he had neither been lawfully admitted for permanent residence for five years (8 U.S.C. 1229b(a)(1)) nor resided in the United States for seven years after a lawful admission (8 U.S.C. 1229b(a)(2)). *Gutierrez* Pet. App. 19a-22a. The IJ first applied *Cuevas-Gaspar* v. *Gonzales*, 430 F.3d 1013 (9th Cir. 2005), to permit Gutierrez to rely on his father's years of lawful residence after his father's admission (attaining LPR status) in 1991 to satisfy Section 1229b(a)(2)'s seven-year continuous-residence requirement. *Gutierrez* Pet. App. 20a-22a. In *Cuevas-Gaspar*, the Ninth Circuit held that a parent's period of continuous residence after the parent's lawful admission could be imputed to a minor child residing with the parent for

the purpose of satisfying Section 1229b(a)(2)'s seven-year residency requirement. 430 F.3d at 1021-1029.

The IJ next invoked the reasoning of *Cuevas-Gaspar* to permit imputation to Gutierrez of his father's 1991 adjustment to LPR status as well. *Gutierrez* Pet. App. 20a-22a. By virtue of that additional imputation, the IJ found that Gutierrez satisfied Section 1229b(a)(1)'s separate requirement that the alien have been an LPR for at least five years. *Id.* at 22a.[1]

Finally, after weighing Gutierrez's equities, the IJ granted him cancellation of removal in the exercise of discretion. *Gutierrez* Pet. App. 22a-26a.

b. The Board of Immigration Appeals (Board) reversed the IJ's decision and remanded for entry of an order of removal. *Gutierrez* Pet. App. 12a-16a.

The Board declined to extend *Cuevas-Gaspar* to permit the use of imputation to satisfy Section 1229b(a)(1)'s requirement that the alien have been lawfully admitted as a permanent resident for five years. *Gutierrez* Pet. App. 13a-14a. The Board distinguished Section 1229b(a) from the statute at issue in *Lepe-Guitron* v. *INS*, 16 F.3d 1021 (9th Cir. 1994), the case that formed the basis for the Ninth Circuit's holding in *Cuevas-Gaspar*. *Gutierrez* Pet. App. 14a-15a. In *Lepe-Guitron*, the Ninth Circuit had considered the term "domicile" as an eligibility requirement under former 8 U.S.C. 1182(c) (1988) (commonly known by its location in the INA as Section 212(c)).[2] In that case, the Ninth Circuit had held

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[1] It was undisputed that Gutierrez had not been convicted of any aggravated felony, so the IJ also found that he satisfied 8 U.S.C. 1229b(a)(3). *Gutierrez* Pet. App. 20a.

[2] Section 212(c), which was repealed in 1996 and replaced by Section 1229b(a) (see Illegal Immigration Reform and Immigrant Responsi-

that a minor child's "domicile" is that of his parents because domicile requires an intent to remain indefinitely and children are not legally capable of forming the necessary intent. 16 F.3d at 1025. The Board explained in this case that the Ninth Circuit's reasoning in *Lepe-Guitron* does not apply to Section 1229b(a)(1)'s five-year LPR status requirement because the period of five years is measured from when the alien was "admitted" as an LPR, and that "admitted" is a term of art under the INA that "does not depend on either the intent or the capacity of the minor, but rather on inspection and authorization by an immigration officer." *Gutierrez* Pet. App. 14a. Accordingly, the Board reasoned that, unlike in *Lepe-Guitron*, "it was unnecessary to look to the respondent's parent to determine intent" when evaluating whether he had accrued five years of LPR status. *Id.* at 15a. "Instead, the critical question was how long had the respondent been lawfully accorded the privilege of residing permanently in the United States as an immigrant." *Ibid.*

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bility Act of 1996, Pub. L. No. 104-208, Div. C, § 304(a)(3) and (b), 110 Stat. 3009-594, 3009-597), provided at the time of *Lepe-Guitron* that:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of paragraphs (1) to (25), (30), and (31) of subsection (a) of this section.

8 U.S.C. 1182(c) (1988). The Board and courts have interpreted that provision to allow for a discretionary waiver for inadmissible or deportable aliens who were permanent residents and who had accrued seven years of "lawful unrelinquished domicile" in the United States. See, *e.g.*, *Lepe-Guitron*, 16 F.3d at 1023; see also *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001) (explaining that Section 212(c) was extended to deportable aliens).

Even as to Section 1229b(a)(2), the requirement directly at issue in *Cuevas-Gaspar*, the Board noted that that provision also "contains no domicile requirement," but rather "requires residence, which contains no element of subjective intent." *Gutierrez* Pet. App. 14a-15a. The Board further concluded that to allow imputation of a parent's status and residence to meet both the first and second prongs of Section 1229b(a) "would essentially destroy the distinct tests mandated by Congress." *Id.* at 15a.

c. On remand, the IJ entered a removal order. *Gutierrez* Pet. App. 7a-9a. Gutierrez appealed, and the Board reaffirmed its prior disposition. *Id.* at 5a-6a. The Board cited its then-recent precedential decision in *In re Escobar*, 24 I. & N. Dec. 231 (2007), in which the Board noted its disagreement with *Cuevas-Gaspar* and elaborated on its reasoning for not extending *Cuevas-Gaspar*'s imputation rationale to Section 1229b(a)(1)'s five-year LPR status requirement. *Gutierrez* Pet. App. 5a-6a.

Subsequently, in *In re Ramirez-Vargas*, 24 I. & N. Dec. 599 (2008), the Board rejected an alien's invocation of imputation in attempting to satisfy Section 1229b(a)(2)'s seven-year continuous-residence requirement. Notwithstanding *Cuevas-Gaspar*'s contrary holding, the Board reasoned that the Ninth Circuit was required to defer to the Board's intervening decisions in *Ramirez-Vargas* and *Escobar* pursuant to *National Cable & Telecommunications Ass'n* v. *Brand X Internet Services*, 545 U.S. 967 (2005). See 24 I. & N. Dec. at 600-601.

d. The Ninth Circuit granted Gutierrez's petition for review and remanded to the Board for reconsideration of his cancellation-of-removal application in light of the

Ninth Circuit's intervening decision in *Mercado-Zazueta* v. *Holder*, 580 F.3d 1102 (2009). *Gutierrez* Pet. App. 2a. In *Mercado-Zazueta*, the Ninth Circuit rejected the Board's decisions in *Ramirez-Vargas* and *Escobar* and treated *Cuevas-Gaspar*'s holding as binding with respect to the seven-year continuous-residence requirement in Section 1229b(a)(2). See 580 F.3d at 1115. The Ninth Circuit also extended *Cuevas-Gaspar* to Section 1229b(a)(1), holding that "for purposes of satisfying the five years of lawful permanent residence required under [Section 1229b(a)(1)], a parent's status as a lawful permanent resident is imputed to the unemancipated minor children residing with that parent." *Id.* at 1113.

3. a. In October 1995, at the age of 15, respondent Sawyers, a native and citizen of Jamaica, was admitted to the United States as an LPR. *Sawyers* J.A. 48, 58; *Sawyers* Pet. App. 10a. According to Sawyers, his mother already had been living in the United States as an LPR at the time. *Id.* at 6a. The record does not indicate whether Sawyers had been present in the United States prior to his admission as an LPR in 1995.

On August 9, 2002, Sawyers was convicted of maintaining a dwelling for keeping a controlled substance, in violation of Delaware law. *Sawyers* J.A. 30-44; *Sawyers* Pet. App. 11a. On December 14, 2005, he was convicted of criminal possession of a controlled substance (cocaine), in violation of New York law. *Id.* at10a.

The Department of Homeland Security (DHS) subsequently commenced removal proceedings against Sawyers by filing a Notice to Appear charging (as amended) that he is subject to removal from the United States under 8 U.S.C. 1227(a)(2)(B)(i) as an alien convicted of a controlled-substance offense. *Sawyers* Pet. App. 10a-11a. Before the IJ, Sawyers denied the charge of

removability and, in the alternative, sought relief in the form of cancellation of removal pursuant to 8 U.S.C. 1229b(a). *Id.* at 11a-13a; *Sawyers* J.A. 16-22, 49-55.

In September 2007, after a hearing, the IJ found Sawyers removable as charged and further held that he was ineligible for cancellation of removal. *Sawyers* Pet. App. 9a-14a. As to the latter question, the IJ determined that Sawyers's August 2002 conviction would have made him removable at that time and therefore cut off his period of residence in the United States before he had accrued the seven years of continuous residence required by Section 1229b(a)(2). *Id.* at 13a.[3]

b. The Board agreed that Sawyers was ineligible for cancellation of removal and dismissed his appeal. *Sawyers* Pet. App. 5a-8a. As an initial matter, the Board agreed with the IJ that Sawyers's August 2002 conviction demonstrated his commission of a removable offense (thereby cutting off his own period of continuous residence short of the requisite seven years). *Id.* at 6a.

The Board then noted that the IJ did not address Sawyers's argument that his mother's period of lawful residence should be attributed to him for purposes of meeting Section 1229b(a)(2)'s seven-year continuous-residence requirement. The Board, however, ultimately deemed that omission harmless. *Sawyers* Pet. App. 6a-

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[3] At the time of the hearing, Sawyers had been "an alien lawfully admitted for permanent residence" for more than five years and hence satisfied 8 U.S.C. 1229b(a)(1). See 8 C.F.R. 1.1(p); *Sinotes-Cruz* v. *Gonzales*, 468 F.3d 1190, 1197 (9th Cir. 2006). In addition, although DHS originally charged Sawyers with being subject to removal for having been convicted of a drug-trafficking aggravated felony, it later withdrew that charge, and the IJ made no determination as to whether any of Sawyers's convictions were aggravated felony offenses. *Sawyers* Pet. App. 10a-11a. Accordingly, the government does not dispute that Sawyers also satisfied 8 U.S.C. 1229b(a)(3) for present purposes.

7a. The Board acknowledged the holding in *Cuevas-Gaspar*, *supra*, that a parent's period of continuous residence after the parent's lawful admission could be imputed to a minor child residing with the parent for the purpose of satisfying the seven-year residency requirement in Section 1229b(a)(2). *Sawyers* Pet. App. 6a-7a. But the Board considered itself bound by its more recent decision, *In re Escobar*, *supra*, in which the Board had explained its disagreement with *Cuevas-Gaspar* in declining to extend the imputation rule to Section 1229b(a)(1)'s five-year LPR status requirement. *Sawyers* Pet. App. 7a. Notwithstanding *Cuevas-Gaspar*'s contrary holding, the Board reasoned that the Ninth Circuit was required to defer to the Board's intervening decision in *Escobar* pursuant to *Brand X Internet Services*, *supra*. *Sawyers* Pet. App. 7a.

c. The Ninth Circuit granted Sawyers's petition for review and remanded to the Board for reconsideration of his cancellation-of-removal application in light of the Ninth Circuit's intervening decision in *Mercado-Zazueta* v. *Holder*, *supra*, "on an open record for any further determinations that the [Board] deems necessary," including findings "regarding the residency of [Sawyers's] mother and regarding whether [Sawyers] was a minor residing with her." *Sawyers* Pet. App. 1a-2a.

SUMMARY OF ARGUMENT

The Ninth Circuit's rule permitting an alien seeking cancellation of removal to rely on a parent's period of lawful permanent resident status and residence after lawful admission to satisfy the eligibility requirements of 8 U.S.C. 1229b(a)(1) and (2) is contrary to the statute's plain language, its legislative history, and the

Board's authoritative interpretation—all of which require that "the alien" personally satisfy the statute's requirements.

A. The plain language of Section 1229b(a) dictates that the decisionmaker look only to the alien seeking relief, not anyone else, to determine whether "*the* alien" "(1) has been an alien lawfully admitted for permanent residence for not less than 5 years," and "(2) has resided in the United States continuously for 7 years after having been admitted in any status." The phrase "after having been admitted," and the definition of "admitted" as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer" (8 U.S.C. 1101(a)(13)(A)), specify the alien's own admission rather than the admission of any other individual. The INA's definition of "residence" as a person's "principal, actual dwelling place in fact, without regard to intent" (8 U.S.C. 1101(a)(33)), denotes the alien's own residence and renders parental intent irrelevant with respect to Section 1229b(a)(2)'s continuous-residence requirement. And the phrase "lawfully admitted for permanent residence," defined to mean "the status of having been lawfully accorded the privilege of residing permanently in the United States" (8 U.S.C. 1101(a)(20)), refers to a status personal to the individual alien.

In light of the clear textual mandates of Sections 1229b(a)(1) and (2), the lack of an express bar on imputation is not tantamount to affirmatively authorizing imputation, nor does it leave the issue open to that interpretation. Allowing imputation would also undermine the operation of related INA provisions in a way that Congress could not have intended.

B. Consistent with the statute's plain language, nothing in the legislative history indicates that Congress

intended that an alien be allowed to rely upon another person's status, residency, or admission date to satisfy the requirements of Section 1229b(a). In particular, the suggestion that Congress ratified the Board's interpretation permitting imputation under former Section 212(c) rings hollow given that Section 212(c) turned on the alien's "domicile," whereas Section 1229b(a)(2) turns on the alien's "residence." By changing the operative statutory language from "domicile" to "residence," Congress eliminated the intent-based requirement on which imputation had been predicated under Section 212(c).

The asserted general legislative preference for family unity likewise cannot trump the statute's clear eligibility requirements; rather, the alien's family ties are to be considered in determining whether he should be granted relief as a matter of discretion if he is otherwise eligible. The long waiting period for minor children of LPRs to obtain derivative LPR status under certain circumstances demonstrates that family unity is by no means an unyielding goal of the INA. The Ninth Circuit's reliance on any such general policy preference is particularly inapt here, where respondents (like many other aliens seeking imputation for purposes of cancellation of removal) are not minors but adults who have committed removable offenses.

C. To the extent any ambiguity remains, the Board's precedential interpretations of Sections 1229b(a)(1) and (2) as not permitting imputation are reasonable and entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). The other courts of appeals that have considered the question have correctly rejected the Ninth Circuit's contrary interpretation and granted deference to the Board. See *Deus* v. *Holder*, 591 F.3d 807, 811 (5th Cir. 2009); *Augustin* v. *Attorney Gen. of the*

U.S., 520 F.3d 264, 269 (3d Cir. 2008); see also *Cervantes* v. *Holder*, 597 F.3d 229, 236 (4th Cir. 2010) (in dicta).

The Ninth Circuit's reasoning in extending imputation from former Section 212(c) to Section 1229b(a) is erroneous in multiple respects. The Ninth Circuit has ignored the fundamental distinction between "domicile" and "residence"—including the absence of "intent" as a consideration for purposes of determining residence—and thereby has failed to acknowledge that "there is no legal reason for [the Court] to turn to [a child's] parents" under Section 1229b(a)(2). *Cuevas-Gaspar* v. *Gonzales*, 430 F.3d 1013, 1031-1032 (9th Cir. 2005) (Fernandez, J., dissenting). The Ninth Circuit has made the further leap of imputing to a child not only a parent's period of residence after lawful admission but also the parent's status as an LPR—despite the absence of any textual hook whatsoever in Section 1229b(a)(1). Although the Ninth Circuit concluded that the Board's interpretation is not entitled to *Chevron* deference because the Board has been inconsistent, it cited only instances in which the Board has permitted imputation in other contexts under different statutory provisions that implicate an alien's state of mind but not "status" or "residence." See *id.* at 1024-1026. The Board has been consistent in its rejection of imputation of objective legal status and has distinguished those other contexts in its reasoned rejection of the Ninth Circuit's contrary rule under Section 1229b(a). See *In re Ramirez-Vargas*, 24 I. & N. Dec. 599, 600-601 (2008); *In re Escobar*, 24 I. & N. Dec. 231, 234 n.4 (2007).

ARGUMENT

SECTION 1229b(a) DOES NOT PERMIT IMPUTATION OF A PARENT'S YEARS OF PERMANENT RESIDENT STATUS, OR RESIDENCE AFTER LAWFUL ADMISSION, TO ESTABLISH AN ALIEN'S OWN ELIGIBILITY FOR CANCELLATION OF REMOVAL

Section 1229b(a) requires (in relevant part) that "the alien" seeking cancellation of removal "(1) has been an alien lawfully admitted for permanent residence for not less than 5 years," and "(2) has resided in the United States continuously for 7 years after having been admitted in any status." 8 U.S.C. 1229b(a). Based on an interpretation rejected by the Board of Immigration Appeals and by the other courts of appeals that have considered it, the Ninth Circuit permitted respondents to circumvent those requirements by pointing to the years of LPR status and residence after lawful admission in any status accrued by someone else—their parents. Such imputation conflicts with the statute's plain terms, structure, and legislative history—as well as with the Board's correct and reasonable interpretation of Section 1229b(a), which is entitled to deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). Accordingly, the Ninth Circuit's atextual and outlying imputation rule cannot stand.

A. The Plain Text Of Section 1229b(a) Requires That The Alien Personally Satisfy Its Eligibility Requirements

Statutory interpretation "must begin with the plain language of the statute." *Negusie* v. *Holder*, 129 S. Ct. 1159, 1178 (2009). Here, the plain language of 8 U.S.C. 1229b(a) dictates that the decisionmaker look to the status, residency, and admission date of "the alien" himself, not of anyone else, for purposes of establishing eligibil-

ity for cancellation of removal. The Ninth Circuit decisions allowing an alien to rely on a parent's status, residency, and admission date to satisfy the requirements of Sections 1229b(a)(1) and (2) cannot be reconciled with the statutory text.

1. Section 1229b(a)(2) requires that "the alien" have resided in the United States for seven continuous years after "having been admitted" in any status

Section 1229b(a)(2) requires as an element of eligibility for cancellation of an alien's removal that "the alien * * * has resided in the United States continuously for 7 years after having been admitted in any status." That text forecloses the Ninth Circuit's imputation rule.

First, by specifying that "*the* alien" whose removal is at issue must have resided in the United States for seven years after having been admitted, the statute leaves no room to impute to the alien the admission date or residency period of anyone else (including the alien's parent). The use of the definite article before "alien" limits the phrase to "the alien" defined earlier in the sentence—that is, the alien for whom cancellation of removal is being considered. "[I]t is a rule of law well established that the definite article 'the' particularizes the subject which it precedes. It is a word of limitation as opposed to the indefinite or generalizing force of 'a' or 'an.'" *American Bus Ass'n* v. *Slater*, 231 F.3d 1, 4-5 (D.C. Cir. 2000) (citation omitted); see *Work* v. *United States ex rel. McAlester-Edwards Coal Co.*, 262 U.S. 200, 208 (1923) ("The use of the definite article [before appraisement] means an appraisement specifically provided for."); see also *American Heritage Dictionary of the English Language* 1792 (4th ed. 2006) (defining "the" as "[u]sed before singular or plural nouns and

noun phrases that denote particular, specified persons or things"). The Ninth Circuit's decisions permitting the alien seeking cancellation relief to rely on the admission and residence of someone else disregard this basic textual point.

Second, and relatedly, the phrase "after having been admitted" reinforces the conclusion that Section 1229b(a)(2) refers to the alien's own admission rather than the admission of any other individual. That reading is supported by the INA's definition of the terms "admission" and "admitted," which is, "with respect to an alien, the lawful entry of *the* alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. 1101(a)(13)(A) (emphasis added); see p. 4, *supra*. In other words, an alien's status as "admitted" is to be determined solely by reference to the alien's *own* lawful entry after official inspection and authorization. The admission of anyone else, including the alien's parent, is irrelevant. The Ninth Circuit's departure from that requirement is especially stark, given that Gutierrez did not attain any lawful status at all (let alone admission) until he was granted LPR status at the age of 19—just two years before committing a removable offense and being placed into removal proceedings. To nevertheless permit imputation in such circumstances would effectively redact the words "of the alien" from the definition of "admission" in 8 U.S.C. 1101(a)(13)(A). Cf. *In re Reza-Murillo*, 25 I. & N. Dec. 296, 299 (B.I.A. 2010).

Third, the INA provides that "[t]he term 'residence' means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent." 8 U.S.C. 1101(a)(33). That definition's use of the possessive pro-

noun "his" evinces that the term "residence"—and hence the term "resided" in Section 1229b(a)(2)—denotes the alien's own residence, and not the residence of anyone else. Moreover, the definition's reference to the "principal, actual dwelling place in fact, without regard to intent," expressly precludes any reliance on intent—which, by contrast, is relevant to determining an alien's domicile (see pp. 28-29, 36-37, *infra*). For that reason, regardless of whether a minor alien is capable of forming a legally sufficient intent to establish *domicile*, there is no basis to consider intent (and thus to impute a parent's intent) with respect to the minor's actual *residence*. Accordingly, the use of the term "resided" in Section 1229b(a)(2) confirms the conclusion that only the actions, status, and physical location of the alien himself have relevance in establishing statutory eligibility for cancellation of removal.

2. Section 1229b(a)(1) requires that "the alien" seeking cancellation of removal have been "lawfully admitted for permanent residence" for five years

Section 1229b(a)(1), the other eligibility requirement at issue in this case, requires that "the alien * * * has been an alien lawfully admitted for permanent residence for not less than 5 years." By referring to the lawful permanent residence of "*the* alien" subject to removal, Section 1229b(a)(1), like Section 1229b(a)(2), makes clear that the alien seeking cancellation must *personally* satisfy the specified requirement. See pp. 16-17, *supra*.

Moreover, the phrase "lawfully admitted for permanent residence" is defined by the INA to mean "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such

status not having changed." 8 U.S.C. 1101(a)(20). "[S]tatus," in turn, is an attribute personal to the individual alien. See *In re Blancas-Lara*, 23 I. & N. Dec. 458, 460 (B.I.A. 2002) ("[S]tatus" "is generally defined in the legal context as a '[s]tanding; state or condition,' and as '[t]he legal relation of [an] individual to [the] rest of the community'"; it "denotes someone who possesses a certain legal standing.") (quoting *Black's Law Dictionary* 1264 (5th ed. 1979)). Section 1229b(a)(1)'s reference to "lawfully admitted for permanent residence" thus reinforces the conclusion that eligibility for cancellation turns on whether and when the government has affirmatively accorded the alien himself the privilege of residing permanently in the United States as an immigrant. The actions and status of others, including the alien's parents, are irrelevant for those purposes.

By contrast, there is no plausible reading of Section 1229b(a)(1)'s text that supports the Ninth Circuit's conclusion that the requirement that "the alien" have been lawfully admitted for permanent residence for five years can be satisfied by the fact that the alien's *parent* had been lawfully admitted for permanent residence for five years. Indeed, under the Ninth Circuit's reading, even an alien who has never been granted LPR status at all might be eligible for cancellation of removal based on a parent's LPR status—contradicting the very title of 8 U.S.C. 1229b(a) ("Cancellation of removal for certain permanent residents"). Cf. *Mercado-Zazueta* v. *Holder*, 580 F.3d 1102, 1110 n.9 (2009)(reserving question). The fact that that is a possible outcome under the Ninth Circuit's interpretation of Section 1229b(a) demonstrates its disconnect with the statute's text.

3. Section 1229b(a)'s lack of an explicit bar to imputation does not suggest that imputation is permissible

As explained above, the plain terms of Sections 1229b(a)(1) and (2) leave no room for imputing somebody else's status, residence, or admission date to establish an alien's eligibility for cancellation relief. See *Cuevas-Gaspar* v. *Gonzales*, 430 F.3d 1013, 1032 (9th Cir. 2005) (Fernandez, J., dissenting) (finding that Section 1229b(a) clearly forecloses imputation). It is therefore not surprising that Section 1229b(a) does not expressly prohibit imputation. Contrary to the Ninth Circuit's conclusion (*id.* at 1022; see also *Sawyers* Br. in Opp. 12-13), the lack of an express bar cannot be read as affirmatively authorizing imputation.

Section 1229(a) is not rendered "silent" simply because it does not explicitly address imputation. "A statute can be unambiguous without addressing every interpretive theory offered by a party." *Salinas* v. *United States*, 522 U.S. 52, 60 (1997); see also, *e.g.*, *Pruidze* v. *Holder*, 632 F.3d 234, 240 (6th Cir. 2011) (explaining that statutory silence does not always indicate a "gap to fill"); *Lin-Zheng* v. *Attorney Gen. of the U.S.*, 557 F.3d 147, 156 (3d Cir. 2009) (en banc) ("[A] statute's silence on a given issue does not confer gap-filling power on an agency unless the question is in fact a gap—an ambiguity tied up with the provisions of the statute.") (citation omitted; brackets in original). If a statute were required to refute every possible alternative, nearly every statute would be silent or ambiguous as to far-fetched alternatives. Cf. *Cuomo* v. *Clearing House Ass'n*, 129 S. Ct. 2710, 2715 (2009); see *Prestol Espinal* v. *Attorney Gen. of the U.S.*, 653 F.3d 213, 220 (3d Cir. 2011) (rejecting approach that "manufactures an ambiguity from Congress' failure to specifically foreclose each exception

that could possibly be conjured or imagined," because that "would create an 'ambiguity' in almost all statutes"). Indeed, in denying the availability of imputation under another immigration provision providing similar cancellation-of-removal relief, the Ninth Circuit itself has recognized that "while the text of [the statute] does not explicitly prohibit imputation, neither is it ambiguous." *Barrios* v. *Holder*, 581 F.3d 849, 865 (2009).[4]

4. The structure of the statutory scheme is inconsistent with imputation

The structure of the statutory scheme at issue reinforces the conclusion that Congress left no room for imputation. See *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.") (citations omitted). That Congress specified separate sub-

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[4] In analogous circumstances, aliens seeking temporary protected status under the INA have contended that their parents' residency could satisfy 8 U.S.C. 1254a(c)(1)(A)(ii)'s continuous-residence requirement. See *De Leon-Ochoa* v. *Attorney Gen. of the U.S.*, 622 F.3d 341, 353 (3d Cir. 2010). Although they argued that the statute is ambiguous because it "does not explicitly permit or disallow [imputation]," the Third Circuit rejected that argument and held that Section 1254a(c)(1)(A)(ii) is not "'ambiguous' merely because it does not expressly forbid every possible mechanism for functional—but not actual—satisfaction of statutory requirements. Else, near every statute would be 'ambiguous' and courts would have unfettered freedom to fashion creative mechanisms for satisfying the otherwise clear requirements mandated by Congress." *Ibid.*; see *Cervantes* v. *Holder*, 597 F.3d 229, 238 (4th Cir. 2010) (Traxler, C.J., concurring) (finding "no ambiguity to be explained or gap to be filled in [Section] 1254a(c)(1)(A)(ii)" with respect to the impermissibility of imputation).

sections within Section 1229b(a) with distinct requirements reflects Congress's insistence that the alien seeking cancellation of removal meet precise standards, and not be allowed to qualify through a form of substantial compliance or by resort to equitable theories. Notably, Congress has demonstrated elsewhere in the INA that it knows how to automatically accord an immigration status or benefit to an alien child when the parent is accorded a certain status or benefit. See, *e.g.*, 8 U.S.C. 1158(b)(3)(A) (2006 & Supp. III 2009) (granting same status as parent to certain children of aliens granted asylum); 8 U.S.C. 1431 (automatic acquisition of United States citizenship for minor child upon naturalization of parent in certain circumstances); see also *Gutierrez* Br. in Opp. 20-21. But it has not done so here.

Applying Section 1229b(a) according to its plain terms also best harmonizes with other relevant sections of the INA. For example, 8 U.S.C. 1229b(d)(1) provides that an alien's period of continuous residence after admission stops accruing for purposes of cancellation relief when that alien has committed a crime that renders him inadmissible. Imputing a parent's earlier admission and residence, as the Ninth Circuit has done, could allow an alien to circumvent that limitation and thereby nullify the operation of Section 1229b(d)(1) in certain cases—a result that Congress would not have intended. Additionally, 8 U.S.C. 1227(a)(2)(A)(i)(I) renders deportable an alien convicted of a crime involving moral turpitude committed within five years of admission. Under the Ninth Circuit's imputation rules, however, such an alien might be able to impute a parent's prior admission date to become eligible for cancellation of removal under Section 1229b(a). In that scenario, the same alien could be considered to have two different dates for which he was

lawfully admitted for permanent residence in the same removal proceeding—his own LPR admission date, which determines his removability, and another person's imputed LPR admission date, which would determine his eligibility for cancellation relief. Congress presumably would not have intended that result either.[5]

B. The Legislative History And Statutory Context Do Not Reveal Any Congressional Intent To Permit Imputation Under Section 1229b(a)

Because Section 1229b(a)'s language leaves no room for the Ninth Circuit's imputation rule, its reliance on the legislative history and legal context underlying the enactment of Section 1229b(a) (*Cuevas-Gaspar*, 430 F.3d at 1026-1029; see also *Gutierrez* Br. in. Opp. 13-17; *Sawyers* Br. in Opp. 14-16) is misplaced. See, *e.g.*, *Schindler Elevator Corp.* v. *United States ex rel. Kirk*, 131 S. Ct. 1885, 1893 (2011) ("In interpreting a statute, [the Court's] inquiry must cease if the statutory language is unambiguous.") (citations and internal quotation marks omitted). Not surprisingly, there is no indication that Congress intended—contrary to Section 1229b(a)'s plain text—to allow an alien to impute another person's status, residency, or admission date to satisfy the eligibility requirements for cancellation relief.

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[5] Although having more than one admission date is not itself impossible or inconsistent with the INA, see *In re Alyazji*, 25 I. & N. Dec. 397, 400 (B.I.A. 2011) ("some aliens are admitted to the United States more than once during their lives"), it would be incongruous to use different admission dates in the manner suggested above—especially where the earlier admission date is imputed from somebody else and results in different admission dates for the same immigration status (*e.g.*, LPR).

1. The legislative history furnishes no support for imputation under Section 1229b(a)

Section 1229b(a) was added to the INA by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 304(a)(3) and (b), 110 Stat. 3009-594, 3009-597, to replace the waiver of exclusion (and deportation) previously available under former Section 212(c). See H.R. Conf. Rep. No. 828, 104th Cong., 2d Sess. 213 (1996) (Section 1229b(a) "is intended to replace and modify the form of relief now granted under section 212(c) of the INA."); H.R. Rep. No. 469, 104th Cong., 2d Sess., Pt. I, at 232 (1996) (same); see also *INS* v. *St. Cyr*, 533 U.S. 289, 297 (2001) (explaining that IIRIRA repealed Section 212(c) and replaced it with 8 U.S.C. 1229b(a)).

The limited legislative history that exists, viewed against the backdrop of the existing legal landscape, indicates that Congress focused on three main goals in circumscribing eligibility for the newly created cancellation-of-removal relief: (1) restricting relief from removal for aliens convicted of certain crimes;[6] (2) creating a "stop-time" rule that would stop the running of an alien's period of residence at a defined point;[7] and (3)

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[6] As the Court explained in *St. Cyr*, Section 1229b "gives the Attorney General the authority to cancel removal for a narrow class of * * * aliens[.] So narrowed, that class does not include anyone previously 'convicted of any aggravated felony.'" 533 U.S. at 297 (quoting 8 U.S.C. 1229b(a)(3) (1994 & Supp. V 1999)).

[7] The stop-time rule was motivated by the concern that aliens had been delaying their immigration proceedings in order to continue to accrue time towards eligibility. See H.R. Rep. No. 879, 104th Cong., 2d Sess. 108 (1997) ("The reforms ended the accrual of time-in-residence on the date an alien is placed into removal proceedings, thus removing the incentive for aliens to prolong their cases in the hope of

clarifying the operation of the durational requirements for legal status and physical presence that had existed under Section 212(c). As explained below, the third issue culminated in the requirements at issue in this case.

In pertinent part, Congress enacted Section 1229b(a) to revise the physical presence and status requirements for relief from removal—with no suggestion that an alien could rely on imputation to satisfy them. See *Mercado-Zazueta*, 580 F.3d at 1110 (stating that the statute was crafted "to resolve a circuit split that did not concern imputation"). As noted above (note 2, *supra*), a waiver under former Section 212(c) was available to LPR aliens who could show seven consecutive years of "lawful unrelinquished domicile" in the United States. The courts of appeals had disagreed as to whether those seven years must follow the granting of LPR status to the alien or whether the alien could count years of domicile in the United States under some other lawful status preceding his adjustment to LPR status. See *Cuevas-Gaspar*, 430 F.3d at 1027-1028 (collecting cases).

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remaining in the U.S. long enough to be eligible for relief.") (describing H.R. 1915, one of IIRIRA's predecessors); see also *Removal of Criminal & Illegal Aliens: Hearing Before the Subcomm. on Immigration & Claims of the H. Comm. on the Judiciary*, 104th Cong., 1st Sess. 42 (1995) (statement of T. Alexander Aleinikoff, General Counsel, INS) ("Currently, that 7 years is permitted to run for as long as they're here. We will be proposing legislation that will stop the running of the clock at the beginning of the immigration proceeding when the order to show cause is issued. We think that will then stop needless delay, people filing additional motions to accumulate the 7 years."). The stop-time rule enacted in Section 1229b(d)(1) ensured that the eligibility period ended, at the very latest, at the time immigration proceedings were initiated. As explained above (p. 22, *supra*), however, the Ninth Circuit's imputation rule could undermine its operation in certain circumstances.

In response, Section 1229b(a) created two new and distinct durational requirements. Congress made clear that the first—the five-year LPR status requirement—must be satisfied by years after the alien obtains LPR status, while the second—the seven-year continuous-residence (replacing "unrelinquished domicile") requirement—could be satisfied by years residing in the United States before the alien obtained LPR status (as long as those years were subsequent to the alien's admission under some lawful status). See 8 U.S.C. 1229b(a)(1) and (2). Congress designed those dual requirements, along with the stop-time rule, to "clarify an area of the law regarding the cutoff periods for these benefits that have given rise to significant litigation and different rules being applied in different judicial circuits." 141 Cong. Rec. S6082, S6104 (daily ed. May 3, 1995) (Department of Justice explanation of S. 754, Immigration Enforcement Improvements Act of 1995, a precursor to IIRIRA); see also *Removal of Criminal & Illegal Aliens: Hearing Before the Subcomm. on Immigration & Claims of the H. Comm. on the Judiciary*, 104th Cong., 1st Sess. 15 (1995) (statement of T. Alexander Aleinikoff, General Counsel, INS) (same).

At no point in Congress's consideration of Section 1229b was there any indication that it considered the possibility, let alone intended, that the period of LPR status or residence after lawful admission of anyone other than the alien seeking cancellation of removal—such as the alien's parent—would satisfy the new statutory requirements. See *Deus* v. *Holder*, 591 F.3d 807, 811 (5th Cir. 2009) (finding an "absence of support in the statutory language or legislative history" for the proposition that a parent's residence "was intended to be counted towards the requirements of section 1229b(a)");

Augustin v. *Attorney Gen. of the U.S.*, 520 F.3d 264, 269 (3d Cir. 2008) ("[W]e have been unable to find in IIRIRA's legislative history any indication of Congress's intention regarding imputation."). Nor is there any evidence that Congress approved or intended to adopt the preexisting interpretation permitting imputation with respect to the "domicile" requirement under former Section 212(c). To the contrary, it appears that Congress feared that the carefully prescribed limits on Section 1229b(a) relief would not be respected. See *Removal of Criminal & Illegal Aliens: Hearing Before the Subcomm. on Immigration & Claims of the H. Comm. on the Judiciary*, 104th Cong., 2d Sess. 3 (1996) (statement of Rep. Lamar Smith, Chairman, Subcomm. on Immigration & Claims) ("[T]here is legitimate concern that even a narrowly tailored form of relief would soon be broadened to include a wide range of cases never intended by Congress.").

There is no merit to respondents' argument that it was "settled" (*Sawyers* Br. in Opp. 16) that the previous domicile-based eligibility requirement in former Section 212(c) permitted imputation, and that Congress therefore automatically "authorized the imputation rule" (*id.* at 17; see *Gutierrez* Br. in Opp. 15) when enacting Section 1229b without any mention of imputation. As an initial matter, there is no indication that the imputation issue was ever called to the attention of Congress. See *Brown* v. *Gardner*, 513 U.S. 115, 121 (1994) ("[C]ongressional silence lacks persuasive significance.") (internal quotation marks and citation omitted); see also *United States* v. *Calamaro*, 354 U.S. 351, 359 (1957).

More importantly, the doctrine of congressional ratification does not apply where, as here, "Congress did not simply reenact [the statute] without change." *Jama*

v. *Immigration & Customs Enforcement*, 543 U.S. 335, 349 (2005). In this instance, Congress enacted a new statute, with meaningfully different operative language. In particular, Congress replaced the "domicile" requirement in Section 212(c) with a "reside[nce]" requirement in Section 1229b(a)(2). The latter differs fundamentally from the former: domicile turns on intent, whereas residence does not. Compare *Lepe-Guitron* v. *INS*, 16 F.3d 1021, 1025 (9th Cir. 1994) (adopting common-law definition of "domicile" that "aliens must not only be physically present here, but must intend to remain") (citation omitted), with 8 U.S.C. 1101(a)(33) (defining "residence" to be "without regard to intent");[8] see also pp. 36-37, *infra*. And, with respect to Section 1229b(a)(1)'s separate five-year LPR status requirement, there is neither a domicile nor a residence requirement—leaving no textual hook whatsoever for imputation.

As Gutierrez acknowledges, the prior authority permitting imputation under Section 212(c) reasoned that "because most minors are legally incapable of forming the requisite intent to establish a domicile, their domicile is determined by that of their parents." *Gutierrez* Br. in Opp. 13-14 (internal quotation marks and citations omitted). There is no similar intent-based requirement in Section 1229b(a) to support the use of imputation for cancellation of removal. See *In re Escobar*, 24 I. & N. Dec. 231, 233 (B.I.A. 2007) ("[R]esidence is different from domicile because it 'contains no element of subjective intent.' Accordingly, we conclude that there is no logical or legal basis to consider the residence of a minor alien's parents in determining whether the minor ac-

[8] The definition of "residence" in 8 U.S.C. 1101(a)(33) long predated IIRIRA, see Immigration and Nationality Act, ch. 477, § 101(a)(33), 66 Stat. 170, whereas "domicile" was never defined in the Act.

quired the necessary years of residence" under Section 1229b(a).) (quoting *Cuevas-Gaspar*, 430 F.3d at 1031 (Fernandez, J., dissenting)); see also *Augustin*, 520 F.3d at 270-271 (similar); *Deus*, 591 F.3d at 810-811 (similar). Whether "Congress in IIRIRA eliminated the word 'domicile' in favor of 'residence' in order to eliminate imputation" (*Sawyers* Br. in Opp. 17 (citation omitted)) or for some other purpose (*Gutierrez* Br. in Opp. 14-15) is beside the point; the pertinent fact is that there is no longer any intent-based requirement on which imputation (or ratification thereof) could be predicated.

2. The general preference for family unity does not trump the statute's text

Lacking any direct evidence of congressional intent, the Ninth Circuit premised its imputation rule on what it perceived to be the "high priority" accorded by the immigration laws to keeping LPR parents and their minor children together. *Cuevas-Gaspar*, 430 F.3d at 1024 (quoting *Lepe-Guitron*, 16 F.3d at 1025); see *Mercado-Zazueta*, 580 F.3d at 1105-1106; see also *Gutierrez* Br. in Opp. 20-22; *Sawyers* Br. in Opp. 21-22. But there is no reason to believe that Congress intended that general policy to trump Section 1229b(a)'s explicit requirement that the alien himself meet certain minimum criteria to qualify for cancellation of removal. Rather, the existence of family ties in the United States is a positive factor to be considered in determining whether an alien who is eligible for cancellation of removal should be granted that relief as a matter of discretion. See *In re C-V-T-*, 22 I. & N. Dec. 7, 11 (B.I.A. 1998).

In any event, in cases in which aliens would rely upon their parents' status or residence to satisfy the eligibility criteria of Sections 1229b(a)(1) and (2), the aliens

applying for relief typically are *not* unemancipated minors seeking to reunite or remain with their parents in the United States. Instead, they are adults seeking to avoid removal after committing removable offenses. Respondent Gutierrez, for example, was not granted LPR status in his own right until October 2003, at the age of 19, and he did not seek to benefit from imputation of his father's LPR status and residence until after he was apprehended and placed in removal proceedings for alien smuggling in December 2005, at the age of 22. *Gutierrez* Pet. App. 12a-13a. Respondent Sawyers also did not seek to benefit from imputation until after he was placed in removal proceedings for his drug convictions, when he was 26 years old. *Sawyers* Pet. App. 10a-11a; *Sawyers* J.A. 56-57.

Moreover, any immigration-law preference for family unity is not absolute. Although many immigration programs permit an alien's spouse and minor children to apply for admission at the same time the principal alien obtains admission as an LPR, not all do. The legalization program under the Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, 100 Stat. 3359, for example, does not provide for derivative legal status for immediate family members. See 8 U.S.C. 1255a (2006 & Supp. III 2009) (providing for adjustment of status for only those aliens individually meeting the requirements); *Family Unification, Employer Sanctions & Anti-Discrimination Under IRCA: Hearing Before the Subcomm. on Immigration, Refugees, & Int'l Law of the H. Comm. on the Judiciary*, 100th Cong., 2d Sess. 34 (1988) ("Congress didn't order derivative legalization" under IRCA) (statement of Rep. Romano L. Mazzoli); *id.* at 147-148 ("Congress clearly said no derivative legalization—we had an opportunity to say it, and

we intentionally did not make every member of the family automatically part of the one successful application."); *Applicant Processing for Family Unity Benefits*, 56 Fed. Reg. 42,948 (Aug. 30, 1991) (Under IRCA, "no provisions [were] made for any derivative immigration status for their spouses or children.").

Aliens who obtain LPR status through IRCA, and others who for whatever reason did not or could not apply for their immediate family members along with their own application, may independently seek a visa for their immediate family members under 8 U.S.C. 1151-1153 (2006 & Supp. III 2009). The number of visas allocated to spouses and minor children of LPRs is subject to annual numerical limits set by Congress (8 U.S.C. 1153(a)(2)), however, and because demand for those visas has exceeded the available number, a large backlog has existed for visas in that category for decades. Accordingly, many immediate family members of LPRs must wait years to immigrate to the United States.[9] For example, when Gutierrez was granted LPR status in October 2003, children of LPRs emigrating from Mexico had been waiting over seven years (11 years if over the age of 21) for a visa. See U.S. Dep't of State, *Visa Bulle-*

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[9] Some immediate relatives of IRCA beneficiaries were granted a limited form of relief from removal under the Family Unity Program. See Immigration Act of 1990, Pub. L. No. 101-649, § 301, 104 Stat. 5029, located as amended at 8 U.S.C. 1255a note 3. But that relief was available only to immediate relatives who entered the United States prior to certain specified dates in 1988. *Ibid.*; see *In re Reza-Murillo*, 25 I. & N. Dec. at 297 n.1 (describing program); see also 8 U.S.C. 1101(a)(15)(V).

tin for October 2003, http://www.travel.state.gov/visa/bulletin/bulletin_2985.html.[10]

Although well aware of this backlog and the long waiting times that result, Congress for the most part has not acted to eliminate them.[11] Congress's failure to respond indicates that the "preference" for family members of LPRs is just that—a preference—and not an absolute mandate that trumps all other immigration policy goals or statutory requirements. Congress thus has not categorically placed a preference for unifying minor (let alone adult) children with their LPR parents in the United States above all other requirements of the immigration laws. The Ninth Circuit's rule that aliens may rely on their parents' LPR status and residence to obtain cancellation relief under Section 1229b(a) essentially allows aliens an end-run around specific statutory limitations on obtaining lawful status; indeed, the Ninth Circuit's rule would impute a parent's adjustment to LPR status even if the alien had not or could not have

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[10] For that reason, the delay alien children experience in obtaining LPR status may be attributable in certain cases to the waiting time for immigrant visas and not to any decision on the part of the alien's parents. Contrary to Sawyers's suggestion (*Sawyers* Br. in Opp. 20-21), however, the Ninth Circuit's imputation rule does not require a court to examine the reasons why an alien did not obtain LPR status when his parent obtained that status. Nor does the statute provide any basis for such an inquiry. Cf. *Mercado-Zazueta*, 580 F.3d at 1115-1116 (Graber, J., concurring).

[11] The visa backlog was the subject of much discussion in Congress prior to the passage of IIRIRA. See H.R. Rep. No. 469, 104th Cong., 2d Sess., Pt. I, at 134 (1996) ("[T]here is a backlog of 1.1 million spouses and minor children of lawful permanent residents waiting for admission or for legal status."). Congress, however, rejected proposals to eliminate or reduce the backlog. See *id.* at 84; H.R. Rep. No. 879, 104th Cong., 2d Sess. 121 (1997).

satisfied the procedural and substantive eligibility requirements for LPR status at that earlier time. See *Escobar*, 24 I. & N. Dec. at 234 (reasoning that imputation under Section 1229b(a)(1) disregards "the mandated statutory and regulatory application process and the substantive eligibility requirements for admission"). Relatedly, such imputation bypasses limitations placed on the availability of cancellation-of-removal relief in Section 1229b(a), and thereby upsets Congress's carefully crafted balance among competing policy concerns.

C. The Board's Reasonable Interpretation Of Section 1229b(a) Is Entitled To *Chevron* Deference

Given that the plain meaning of Section 1229b(a) forecloses imputation of another alien's status, period of residency, or date of admission, the questions presented can be resolved at step one of the *Chevron* analysis. See *Chevron*, 467 U.S. at 843 (calling for further inquiry only if "the statute is silent or ambiguous with respect to the specific issue"). But even if the statute were deemed ambiguous, the Board's precedential interpretation that imputation is impermissible—see *Escobar*, 24 I. & N. Dec. at 233-235 (Section 1229b(a)(1)); *In re Ramirez-Vargas*, 24 I. & N. Dec. 599 (2008) (Section 1229b(a)(2))—is at least reasonable and thus entitled to controlling deference at step two of the *Chevron* analysis. See *Chevron*, 467 U.S. at 843-844; see also *Negusie*, 129 S. Ct. at 1163-1164 (according *Chevron* deference to Board's interpretation of INA); *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999) (same).

1. The standard for what constitutes an agency's reasonable interpretation for *Chevron* purposes is broad, 467 U.S. at 843, and courts ordinarily defer to the Board's interpretation of the INA unless the interpreta-

tion is "clearly contrary to the plain and sensible meaning of the statute." *Mota* v. *Mukasey*, 543 F.3d 1165, 1167 (9th Cir. 2008) (citation omitted); see *Mayo Found. for Med. Educ. & Research* v. *United States*, 131 S. Ct. 704, 712 (2011) ("The sole question for the Court at step two under the *Chevron* analysis is 'whether the agency's answer is based on a permissible construction of the statute.'") (quoting *Chevron*, 467 U.S. at 843). As other courts of appeals have concluded with respect to Section 1229b(a)(2), the Board's "straightforward" refusal here "to read into the statute an [imputation] exception seemingly at odds with the statute's requirements" is at the very least reasonable. *Augustin*, 520 F.3d at 270-271 (holding that the Board's "refusal to create an exception simply heeds the statute's plain requirements"); see *Deus*, 591 F.3d at 811 (deeming "the [Board]'s interpretation * * * not inconsistent with the statute and therefore permissible under *Chevron*'s deferential review"); see also *Cuevas-Gaspar*, 430 F.3d at 1032 (Fernandez, J., dissenting). That should be the end of the inquiry under *Chevron*.

The Ninth Circuit has not held that the Board's interpretation rejecting imputation is foreclosed by the terms of the statute; nevertheless, it has determined that the Board's interpretation is unreasonable. See *Mercado-Zazueta*, 580 F.3d at 1112-1115; *Cuevas-Gaspar*, 430 F.3d at 1024-1029. But Section 1229b(a)'s text and legislative history provide more than ample support for the Board's interpretation. As discussed above (pp. 15-20, 23-29, *supra*), the plain language of Section 1229b(a) dictates that the decisionmaker look only to the status, residency, and admission of "the alien" who is seeking cancellation of removal for purposes of establishing the alien's eligibility for that relief,

and the legislative history lacks any basis for a contrary reading.

2. By contrast, the Ninth Circuit's reasoning—based on its precedent that originated in the different wording of former Section 212(c), and on its policy determinations—fails on its own terms. The Ninth Circuit's imputation rule traces back to *Lepe-Guitron*, *supra*, in which it held that a parent's domicile could be imputed to an unemancipated minor child for purposes of the "domicile" requirement under former Section 212(c). In that case, the Ninth Circuit relied on the fact that the common-law definition of "domicile" incorporates notions of intent, *i.e.*, not only physical presence but an intent to remain indefinitely in the United States. *Lepe-Guitron*, 16 F.3d at 1025. The Ninth Circuit reasoned that because "children are, legally speaking, incapable of forming the necessary intent to remain indefinitely in a particular place," "a child's domicile follows that of his or her parents." *Ibid.* (citations omitted); see Restatement (Second) of Conflict of Laws § 22(1), at 88 (1971) (providing that generally "[a] minor has the same domicil as the parent with whom he lives").

In *Cuevas-Gaspar*, the Ninth Circuit extended the reasoning of *Lepe-Guitron* to Section 1229b(a)(2) by effectively equating "domicile" with "residence"—the specified metric for Section 1229b(a)(2)'s seven-year requirement. 430 F.3d at 1026. Over a dissent, the panel majority in *Cuevas-Gaspar* rejected the distinction between residence and domicile, stating summarily that the distinction "is not * * * so great as to be dispositive." *Ibid.* The *Cuevas-Gaspar* majority then took a further leap by reasoning that because *Lepe-Guitron* held "that a parent's 'lawful unrelinquished domicile' is imputed to the parent's minor children," it must have

"necessarily held that the parent's *admission* for permanent residence was also imputed to the parent's minor children." *Ibid.* On that basis, it proceeded broadly to permit the alien child to rely on a parent's "admission" for purposes of satisfying the requirement of Section 1229b(a)(2). *Ibid.*

The Ninth Circuit's extension of *Lepe-Guitron* in *Cuevas-Gaspar* is erroneous in at least two critical respects. First, it ignores the distinction between "domicile" and "residence." The INA expressly provides that "residence" is to be evaluated "without regard to intent," 8 U.S.C. 1101(a)(33)—a key consideration in determining domicile. See pp. 28-29, *supra*. Courts consistently have recognized that the element of intent distinguishes the two concepts in the immigration context. See, *e.g.*, *De Leon-Ochoa* v. *Attorney Gen. of the U.S.*, 622 F.3d 341, 353 (3d Cir. 2010) (distinguishing "residence from domicile, because under the INA, residence is defined as an alien's 'principal, actual dwelling place in fact, *without regard to intent*'") (quoting 8 U.S.C. 1101(a)(33); citing *Augustin*, 520 F.3d at 270-272); *Cervantes* v. *Holder*, 597 F.3d 229, 237 (4th Cir. 2010) ("[T]here is a crucial distinction between a 'domicile' and a 'residence.'"); *Rosario* v. *INS*, 962 F.2d 220, 224 (2d Cir. 1992) (noting that although "[a] minor's domicile is the same as that of its parents," residence is "determined from the physical fact of * * * living in a particular place"); *Chan Wing Cheung* v. *Hamilton*, 298 F.2d 459, 461 (1st Cir. 1962) ("'Residence' within the [INA] is not the equivalent of domicile.").[12]

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[12] Even the Ninth Circuit elsewhere has recognized and given effect to the intent-based distinction between "domicile" and "residence" under the immigration laws. *Kyung Park* v. *Holder*, 572 F.3d 619, 623-624 (2009) (comparing 8 C.F.R. 213a.1 with 8 U.S.C. 1101(a)(33)); see

The Ninth Circuit failed to provide any sound basis to transpose the common-law understanding of "domicile," which incorporates intent, onto the statutorily defined term "residence." Crucially, once "intent" is removed from the analysis, "there is no legal reason for [the Court] to turn to [a child's] parents." *Cuevas-Gaspar*, 430 F.3d at 1031-1032 (Fernandez, J., dissenting); see *Cervantes*, 597 F.3d at 237 (stating that children "can have their own residences, separate and apart from that of their parents"); *Deus*, 591 F.3d at 811 (holding that "the relevant inquiry under [Section] 1229b(a), residence, presents no question regarding a minor's intention").

Second, the Ninth Circuit in *Lepe-Guitron* discussed the imputation of "domicile" alone and confined its holding to the limited principle "that a child's domicile follows that of his or her parents." 16 F.3d at 1025. *Lepe-Guitron* did not hold that a parent's lawful admission may be imputed to the child; indeed, there was no occasion to do so in that case. The court in *Lepe-Guitron* emphasized that the alien child himself had entered the United States legally with his parents and "was always legally within the country [and] was domiciled here." *Id.* at 1024. The alien child also had become an LPR as a minor, albeit only for three years before he was convicted and invoked Section 212(c) relief. *Id.* at 1022-1023. Because the court in *Lepe-Guitron* rejected an interpretation that would require a minor child's (as opposed to an adult's) "'lawful unrelinquished domicile' to begin on the day he or she acquires permanent residence," there was no need to impute the parent's LPR

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8 C.F.R. 213a.1 ("*Domicile* means the place where a sponsor has his or her principal residence, as defined in section 101(a)(33) of the Act, with the intention to maintain that residence for the foreseeable future.").

status to the alien child. *Id.* at 1025; see *id.* at 1026 n.12 (stating that only adults must be lawful permanent residents to accrue domicile status). The Ninth Circuit's reliance in *Cuevas-Gaspar* on *Lepe-Guitron* as supporting imputation of lawful admission (in addition to residency) thus has no basis in *Lepe-Guitron*. And *Mercado-Zazueta*'s extension of *Cuevas-Gaspar* as requiring imputation of a parent's LPR status to the alien seeking relief under Section 1229b(a)(1) (580 F.3d at 1113) is doubly mistaken for that reason.

3. Although the Ninth Circuit identified "other contexts" in which the Board has permitted imputation, those contexts are easily distinguishable and thus create no "inconsistency" diminishing the deference owed to the Board's interpretation of Section 1229b(a). *Mercado-Zazueta*, 580 F.3d at 1111-1112; see *Cuevas-Gaspar*, 430 F.3d at 1024-1026. Most fundamentally, those different contexts—involving issues of abandonment, firm resettlement, and knowledge of admissibility, see *ibid.*—implicate state of mind, not objective conditions such as "status" or "residence."

It is true, for example, that the Board has imputed to an alien child (to the child's detriment) a parent's abandonment of LPR status; but abandonment clearly incorporates consideration of the alien's intent. See, *e.g.*, *In re Huang*, 19 I. & N. Dec. 749, 755 (B.I.A. 1988) (stating that "the immigration judge was incorrect in concluding that the applicant's intent was irrelevant in determining whether she [as well as her children] had abandoned that status"); see also *Augustin*, 520 F.3d at 271 (finding that such cases "are not in direct conflict with the BIA's interpretation of the cancellation statute because the determination in these cases turned in part on the minor alien's intention"); *Escobar*, 24 I. & N. Dec. at 234 n.4

("The imputation of a decision to abandon permanent resident status from a parent to a child is consistent with the above-mentioned longstanding policy that a child cannot form the intent necessary to establish his or her own domicile."). The other situations are similarly distinguishable. See, *e.g.*, *Vang* v. *INS*, 146 F.3d 1114, 1116-1117 (9th Cir. 1998) (likening firm resettlement in a third country to domicile for purposes of the bar to asylum); *Senica* v. *INS*, 16 F.3d 1013, 1016 (9th Cir. 1994) (attributing parents' knowledge of misrepresentation in entering the United States to the children).

By contrast, the criteria at issue here—"residence," "admission," and LPR "status"—depend solely on objective conduct by the alien personally or some official action by the government, with respect to the alien, without regard to mental state. The Board has been consistent in its rejection of imputation of objective legal status under Section 1229b(a) and has explained its reasoned (and wholly reasonable) rejection of the Ninth Circuit's contrary rule—largely for the reasons set forth in this brief. See *Ramirez-Vargas*, 24 I. & N. Dec. at 600-601; *Escobar*, 24 I. & N. Dec. at 233-235. Accordingly, to the extent the Court finds any ambiguity in the statutory language, the Board's interpretation is entitled to deference.

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 2011

APPENDIX

1. 8 U.S.C. 1101 provides in pertinent part:

Definitions

(a) As used in this chapter—

* * * * *

(13)(A) The terms "admission" and "admitted" mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer.

* * * * *

(20) The term "lawfully admitted for permanent residence" means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.

* * * * *

(33) The term "residence" means the place of general abode; the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.

* * * * *

2. 8 U.S.C. 1229b provides in pertinent part:

Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

* * * * *

(d) Special rules relating to continuous residence or physical presence

(1) Termination of continuous period

For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end (A) except in the case of an alien who applies for cancellation of removal under subsection (b)(2) of this section, when the alien is served a notice to appear under section 1229(a) of this title, or (B) when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United

States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.

* * * * *

RESPONDENT'S BRIEF

FOR ARGUMENT
RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
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No. 10-1542

IN THE
Supreme Court of the United States

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
Petitioner,

v.

CARLOS MARTINEZ GUTIERREZ,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a parent's years of lawful permanent resident status can be imputed to an alien who resided with that parent as an unemancipated minor, for the purpose of satisfying 8 U.S.C. § 1229b(a)(1)'s requirement that the alien seeking cancellation of removal have "been an alien lawfully admitted for permanent residence for not less than 5 years."

2. Whether a parent's years of residence after lawful admission to the United States can be imputed to an alien who resided with that parent as an unemancipated minor, for purposes of satisfying 8 U.S.C. § 1229b(a)(2)'s requirement that the alien seeking cancellation of removal have "resided in the United States continuously for 7 years after having been admitted in any status."

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Mozes v. Mozes,
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Pope v. Williams,
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United States v. Park,
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TABLE OF AUTHORITIES
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Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-209, Div. C 8

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8 U.S.C. § 1433 48

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141 Cong. Rec. S6082 (May 3, 1995) 10, 35

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H.R. Rep. No. 85-1199, 1957 U.S.C.C.A.N. (1957) 45

H.R. Rep. No. 89-745, 12 (1965) 46

S. Rep. No. 1515, 81st Cong., 2d Sess. 383 (1950) 41

S. Rep. No. 8-1515 (1952) 46

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OTHER AUTHORITIES

Jennifer M. Chacón, *Loving Across Borders: Immigration Law and the Limits of Loving*, 2007 Wis. L. Rev. 345 (2007) 45

Stephen H. Legomsky & Cristina M. Rodriguez, *Immigration and Refugee Law and Policy* (5th ed. 2009) 45

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U.S. Citizenship and Immigration Services, "Green Card for a Family Member of a Permanent Resident" (2011), http://www.uscis.gov/portal/site/uscis 50, 51

U.S. Citizenship and Immigration Services, "Green Card for an Immediate Relative of a US Citizen" (2011), http://www.uscis.gov/portal/site/uscis 51

U.S. Dept. of State, *Visa Bulletin, Vol. VIII, No. 5: Immigrant Numbers for May 1999*, http://dosfan.lib.uic.edu/ERC/visa_bulletin/9905bulletin.html. 12

INTRODUCTION

In enacting immigration laws, Congress has consistently treated children as part of integral family units in which parents are responsible for making crucial immigration decisions on their children's behalf. Both courts and immigration agencies have adhered to this precept and have imputed a parent's years of residence, decisions, state of mind, and status to a minor child in various immigration contexts.

Cancellation of removal is one immigration context in which imputation serves the dual purpose of promoting family unity and protecting individuals who have strong ties to the United States. The Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.* (2006 & Supp. IV 2011), vests the Attorney General of the United States with unreviewable discretion to cancel the removal from the United States of an alien who has committed a removable offense. 8 U.S.C. § 1229b. The statute sets forth several eligibility requirements, two of which are at issue here. First, the statute requires that the alien seeking cancellation has been "lawfully admitted for permanent residence for not less than 5 years." 8 U.S.C. § 1229b(a)(1). Second, it requires that the alien "has resided in the United States continuously for 7 years after having been admitted in any status." 8 U.S.C. § 1229b(a)(2). The court of appeals has held that both a parent's period of lawful permanent resident status and a parent's period of continuous residence may be imputed to an unemancipated minor for the purposes of satisfying these durational requirements.

The court of appeals' interpretation of section 1229b(a) is correct. Circuit courts uniformly permitted such imputation to a minor under section 1229b(a)'s predecessor statute, former INA section 212(c), and there is no indication that Congress intended to alter that long-standing judicial interpretation. Imputation also furthers the congressional goal of promoting family unity through legal immigration, and specifically of maintaining the family relationship between lawful permanent-resident parents and their minor children. Finally, imputation is necessary to achieve section 1229b(a)'s purpose of enabling the Attorney General to consider the equities of persons with longstanding ties to the United States. Typically, a divergence in status of parent and child is a product of systemic delays in processing routine applications to adjust the child's status; there is no rational basis why Congress would foreclose even eligibility for consideration to children with strong equities of longstanding residence in the United States because of such happenstance, and the Government gives none. The BIA's contrary and harsh interpretation that imputation is unavailable under section 1229b(a), when it applies imputation to the detriment of the children under other provisions, is unreasonable.

STATEMENT OF THE CASE

I. Statutory Background

A. Process of Obtaining Derivative Lawful Permanent Residence for Minors

A parent who is "an alien lawfully admitted for permanent residence may file a petition on behalf of a child or an unmarried son or daughter for preference classification under section 203(a)(2)" of the INA. 8 C.F.R. § 204.2(d)(1). Obtaining lawful permanent resident status for a minor child is a relatively routine process that involves little, if any, discretion on the part of the immigration authorities. A lawful permanent resident parent must first obtain approval of his immigrant visa petition filed on behalf of the child (Form I-130). 8 U.S.C. § 1153(a)(2); 8 C.F.R. § 204.1(a)(1).

Approval of a petition filed on behalf of a child is ministerial as long as the parent provides the appropriate evidence of the parent's lawful permanent residence and relationship to the child. 8 C.F.R. § 204.1(f). With the I-130 petition, the parent must file originals or true copies of a permanent resident card or other documents proving lawful permanent residence. 8 C.F.R. § 204.1(g). To demonstrate the requisite relationship with a child, a mother simply needs to provide a copy of the child's birth certificate showing the mother's and child's names. A father needs to provide a copy of the birth certificate and a copy of his marriage or divorce certificate. For a child born out of wedlock, the father "must show that he is the natural father and that a

bona fide parent-child relationship was established." 8 C.F.R. § 204.2(d)(2)(iii).

Once the petition is approved, the child must wait to receive an immigrant visa number from the United States Department of State. When the visa number becomes available, a child living outside of the United States completes immigration processing at the local United States consulate, and a child residing within the United States applies to adjust his status with the U.S. Citizenship and Immigration Services (CIS) (a Department of Homeland Security component agency) by filing an application for adjustment of status (Form I-485). 8 U.S.C. § 1154.

A child of a lawful permanent resident receives a second-level preference for an immigrant visa.[1] 8 U.S.C. § 1153(a)(2). Once the I-130 is approved, the child will receive a "priority date" and will be issued a visa once one becomes available. Section 202 of the INA, 8 U.S.C. § 1152, governs the number of visas available per country for family-sponsored immigrants and provides special rules for minor children of lawful permanent residents. Because of the numerical quotas, there can be a long waiting period before an immigrant visa becomes available.

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[1] The family preference system allocates a numerical visa quota to specific groups of family-based immigrants, setting priority among these immigrants on the basis of the relationship with their sponsors (who must be either U.S. citizens or lawful permanent residents). The first-level preference is reserved for adult children of U.S. citizens. In addition, spouses, parents, and unmarried minor children of U.S. citizens are admitted into the United States as immediate relatives, without quota limitations.

Nevertheless, children of lawful permanent residents receive a preference over other types of immigrants and are consistently approved for such visas once they are available.[2]

Normally, only aliens who are in the United States in a legal status are permitted to apply for adjustment of status. 8 U.S.C. § 1255(a). In 1994, however, Congress enacted Section 245(i) of the INA, 8 U.S.C. § 1255(i), allowing aliens who were in the United States illegally to apply for adjustment of their status to that of a permanent resident. Dep't of Commerce, etc., Appropriations Act, Pub. L. No. 103-317, § 506(b), 108 Stat. 1724, 1765 (1994). Although section 245(i) expired in 1997, Congress extended or reinstated this provision for additional limited periods, most recently in 2000. *See* Legal Immigration Family Equity (LIFE) Act, Pub. L. No. 106-553, Title XI, 114 Stat. 2762, 2762A-142 (Dec. 21, 2000), as amended by LIFE Act Amendment of 2000, Pub. L. No. 106-554, Title XV, § 1502(a)(1)(B), 114 Stat. 2763, 2763A-324 (Dec. 21, 2000) (substituting "April 30, 2001" for "January 28, 1998" in INA § 245(i)). Under the LIFE Act, an alien for whom a qualified I-130 immigrant petition has been filed prior to April 30, 2001, and who was physically present in the United States on December 21, 2000, could apply for adjustment of status, provided an

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[2] Subsection (a)(4)(A), moreover, exempts 75 percent of second-level preference set-aside visas for spouses and children from the usual per-country limitation. 8 U.S.C. § 1152(a)(4)(A). The final prerequisite to lawful permanent residence is a medical examination by a civil surgeon or an overseas panel physician. 8 C.F.R. § 245.5.

immigrant visa number was immediately available to him. *Id.*

The LIFE Act also created a temporary nonimmigrant "V" status for spouses and minor children of lawful permanent residents who were waiting for longer than three years for an immigrant visa based on a previously filed I-130 petition. 8 U.S.C. §§ 1101(a)(15)(V), 1255(i). In addition, the alien who properly filed his application for adjustment of status under sections 245(a) and (i) was considered to be an alien "present in the United States under a period of stay authorized by the Attorney General," provided that the alien was not already in removal proceedings. 8 C.F.R. § 245a.34(d); LIFE Act at § 1504.

B. Statutory Scheme for Cancellation of Removal

The INA, 8 U.S.C. § 1101 *et seq.*, vests the Attorney General with unreviewable discretion to cancel the removal from the United States of an alien who committed a removable offense. 8 U.S.C. § 1229b. The statute, however, sets forth several eligibility requirements, authorizing cancellation of removal only if the alien

> (1) has been an alien lawfully admitted for permanent residence for not less than 5 years,
>
> (2) has resided in the United States continuously for 7 years after having been admitted in any status, and
>
> (3) has not been convicted of any aggravated felony.

8 U.S.C. § 1229b(a).

The INA specifies that "[t]he term 'lawfully admitted for permanent residence' means the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." 8 U.S.C. § 1101(a)(20). The term "residence" is defined as "the place of general abode," and "the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent." 8 U.S.C. § 1101(a)(33). The INA defines the term "permanent" to mean "a relationship of continuing or lasting nature, as distinguished from temporary," and "a relationship may be permanent even though it is one that may be dissolved eventually at the instance either of the United States or of the individual, in accordance with law." 8 U.S.C. § 1101(a)(31).

"The terms 'admission' and 'admitted' mean, with respect to an alien, the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A). The Board of Immigration Appeals (BIA) has interpreted these terms to encompass not only an alien's entry into the United States at a port of entry with the permission of an immigration officer, but also an adjustment to a lawful permanent status by an alien who had entered the United States without permission or who was paroled. *In re Alyazji*, 25 I. & N. Dec. 397, 399-404 (B.I.A. 2011).

The relief of cancellation of removal is discretionary. 8 U.S.C. § 1229b(a); *see also Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2589 (2010). While an alien must satisfy section 1229b(a)'s

statutory eligibility requirements for cancellation of removal, the ultimate determination of whether to grant cancellation remains in the discretion of the Attorney General. *See Mercado-Zazueta v. Holder*, 580 F.3d 1102, 1115 (9th Cir. 2009). In the exercise of this discretion, the immigration courts weigh the seriousness of the alien's offense against countervailing equitable factors, such as "family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred at a young age), evidence of hardship to the [alien] and his family if deportation occurs, ... a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character." *In re C-V-T-*, 22 I. & N. Dec. 7, 11 (B.I.A. 1998). The decision whether to grant or deny cancellation of removal is insulated from judicial review. 8 U.S.C. § 1252(a)(2)(B)(i).

Section 1229b(a) was enacted as a part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, Title III § 304(a)(3), 110 Stat. 3009-594 (1996). Prior to IIRIRA, the cancellation-of-removal provision was contained in the INA's section 212(c), which vested the Attorney General with discretion to waive the deportation of

> [a]liens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are

> returning to a lawful unrelinquished domicile of seven consecutive years.

8 U.S.C. § 1182(c) (1988); *see also* Petr. Br. 7 n.2.[3]

Circuit courts construing former section 212(c) waivers in cases involving minors uniformly concluded that a parent's period of lawful residency could be imputed to a child for the purpose of satisfying the seven-year unrelinquished domicile requirement. *Morel v. INS*, 90 F.3d 833, 841 (3d Cir. 1996), *vacated on reconsideration on other grounds*, 144 F.3d 248 (3d Cir. 1998); *Lepe-Guitron v. INS*, 16 F.3d 1021, 1026 (9th Cir. 1994); *Rosario v. INS*, 962 F.2d 220, 224-25 (2d Cir. 1992). The courts were divided, however, on whether, in order to qualify for relief under former section 212(c), the alien's seven-year period of lawful domicile had to follow his admission as a lawful permanent resident. *Compare Morel*, 90 F.3d at 838, *White v. INS*, 75 F.3d 213 (5th Cir. 1996), *Castellon-Contreras v. INS*, 45 F.3d 149 (7th Cir. 1995), and *Lok v. INS*, 548 F.2d 37 (2d Cir. 1977), *with Chiravacharadhikul v. INS*, 645 F.2d 248 (4th Cir. 1981), *Castillo-Felix v. INS*, 601 F.2d 459 (9th Cir. 1979), and *In re S*, 5 I. & N. Dec. 116, (B.I.A. 1953). As the U.S. Department of Justice explained at the time, the dual durational requirement enacted by section 1229b(a) was designed to "clarify an area of the law regarding the cutoff periods for these

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[3] Although former section 212(c), by its plain terms, applied only to aliens attempting to enter the United States, courts have interpreted it to also allow for discretionary waiver of deportation. *See INS v. St. Cyr*, 533 U.S. 289, 295 (2001); *see also Lepe-Guitron v. INS*, 16 F.3d 1021, 1023 (9th Cir. 1994).

benefits that have given rise to significant litigation and different rules being applied in different judicial circuits." 141 Cong. Rec. S6082, S6104 (May 3, 1995) (explaining S. 754, Immigration Enforcement Improvements Act of 1995, a precursor to IIRIRA).

II. Factual Background

In 1989, when he was five years old, Respondent Carlos Martinez Gutierrez, a citizen of Mexico, was brought to the United States by his parents. Pet. App. 12a, 18a; JA32-33. Martinez Gutierrez's father became a lawful permanent resident on February 7, 1991, when Martinez Gutierrez was seven years old. JA 26, 31.

Since arriving in the United States, Martinez Gutierrez has lived with his family in northern California. JA 32-33. Martinez Gutierrez has had little to no contact with Mexico or his few remaining Mexican relatives. JA 44-45. Martinez Gutierrez attended elementary, middle, and high school in California, graduating in 2002. JA 34. Martinez Gutierrez has been employed since graduation and has pursued further education. JA 34-35. While working, Martinez Gutierrez continued to live at home with his parents; his sister, a United States lawful permanent resident; and his younger brother, a United States citizen. JA 36. Martinez Gutierrez used the money that he earned to help to support his family. JA 37-38.

Martinez Gutierrez became a lawful permanent resident on October 28, 2003, when he was nineteen years old. JA 19. Martinez Gutierrez had traveled a long road to achieve lawful permanent status. Martinez Gutierrez's father had filed an I-130

petition on his behalf in 1993, seeking lawful permanent status for Martinez Gutierrez (then nine years old) as his minor child.[4] The INS received this petition on September 10, 1993, which became Martinez Gutierrez's "priority date" for the purpose of determining how soon he would be allowed to file his own I-485 application for lawful permanent resident status. *See* Application to Register Permanent Residence or Adjust Status (Form I-485) of Carlos Martinez Gutierrez (Martinez Gutierrez Form I-485) at 2, FOIA Request at 286; *see also* INS, Memorandum of Creation of Record of Lawful Permanent Residence, FOIA Request at 278 (listing September 10, 1993 as the priority date).

Martinez Gutierrez's priority date did not become "current" until May 1999, when a visa number became available to him, thereby permitting Martinez Gutierrez to seek adjustment of his status

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[4] Pursuant to Supreme Court Rule 32.3, Martinez Gutierrez is submitting a request to lodge a copy of his adjustment of status application, together with the INS's Memorandum of Creation of Record of Lawful Permanent Residence and the INS's letter informing Martinez Gutierrez that he has been granted permanent resident alien status. Martinez Gutierrez's application is not part of the administrative record below, but has been obtained pursuant to a request under the Freedom of Information Act (FOIA). This Court's consideration of the obtained material is proper because it is not submitted to contest or supplement any adjudicatory fact necessary to a decision in this case (and indeed Martinez Gutierrez's eligibility depends strictly upon this Court's resolution of the statutory interpretation question presented). Rather, the material is of utility to the Court as background material illustrating the operation of the system for adjusting the status of minor children of lawful permanent residents.

to that of a permanent resident. *See* U.S. Dep't of State, *Visa Bulletin, Vol. VIII, No. 5: Immigrant Numbers for May 1999*, http://dosfan.lib.uic.edu/ERC/visa_bulletin/9905bulletin.html. Martinez Gutierrez filed his application for adjustment of status in February 2001. Martinez Gutierrez Form I-485 at 1, FOIA Request at 285. On May 15, 2001, the INS informed Martinez Gutierrez that he "ha[s] been granted permanent resident alien status as of [that] date," FOIA Request at 284, and his application was formally approved on October 28, 2003. JA 19; *see also* INS, Memorandum of Creation of Record of Lawful Permanent Residence, FOIA Request at 278.

On December 2, 2005, Martinez Gutierrez was stopped while trying to re-enter the United States from Mexico with three undocumented minors in his car. JA 39-40. Martinez Gutierrez first represented that the children were his nephews and niece, but he later admitted that they were not his relatives and that they did not have permission to enter the United States. JA 44. Martinez Gutierrez had tried to bring the children into the United States at the request of their mother, a friend who was living in the United States. JA 40-41. Martinez Gutierrez did not expect to profit from bringing the children into the United States; he gave the money he received from the children's mother to their grandfather in Mexico. Martinez Gutierrez was issued a Notice to Appear on December 3, 2005, charging that he was removable under 8 U.S.C. § 1182(a)(6)(E)(i) for attempted alien smuggling. Pet. App. 18a; JA 59.

III. Procedural Background

At a hearing before the Immigration Judge (IJ), Martinez Gutierrez conceded removability and sought cancellation of removal pursuant to 8 U.S.C. § 1229b(a). Pet. App. 19a; JA 24. The IJ found Martinez Gutierrez statutorily eligible for cancellation of removal and, in the exercise of her discretion, granted cancellation. Pet. App. 27a. In rendering her decision, the IJ relied on *Cuevas-Gaspar v. Gonzales*, 430 F.3d 1013, 1021-29 (9th Cir. 2005), which held that a parent's period of continuous residence after admission to lawful status may be imputed to a minor child residing with the parent for the purpose of satisfying section 1229b(a)(2). Guided by the *Cuevas-Gaspar's* holding, the IJ found that Martinez Gutierrez had satisfied the seven-year residence requirement of section 1229b(a)(2). Pet. App. 20a. The IJ further concluded that "a careful reading of *Cuevas-Gaspar*" also mandated that the period of his father's lawful permanent resident status be imputed to Martinez Gutierrez for the purpose of satisfying section 1229b(a)(1), because Martinez Gutierrez had resided with his father as an unemancipated minor. Pet. App. 22a.[5]

The BIA reversed. The BIA refused to extend the court of appeals' holding in *Cuevas-Gaspar* to permit the imputation of his father's period of lawful permanent resident status to Martinez Gutierrez in

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[5] There is no dispute that Martinez Gutierrez had not been convicted of any aggravated felony and therefore satisfied section 1229b(a)(3), the third statutory eligibility requirement for cancellation of removal. Pet. App. 20a; Petr. Br. 6 n.1.

order to satisfy section 1229b(a)(1). Pet. App. 16a. Thus, the BIA concluded that Martinez Gutierrez was not eligible for cancellation of removal because he was two years short of section 1229b(a)(1)'s five-year requirement. *Id.*

On remand, the IJ entered an order of removal, as mandated by the BIA. Pet. App. 7a. The BIA dismissed Martinez Gutierrez's second appeal. Pet. App. 6a. The BIA adhered to its prior holding that "a parent's lawful permanent resident status cannot be imputed to a child for purposes of calculating the 5 years of lawful permanent residence required to establish eligibility for cancellation of removal under [section] 1229b(a)(1)." Pet. App. 5a-6a. The BIA observed that it had reaffirmed this position in an intervening precedential decision, *In re Escobar*, 24 I. & N. Dec. 231 (B.I.A. 2007), which limited the application of *Cuevas-Gaspar* to the instances involving the seven-year residence requirement of section 1229b(a)(2). Pet. App. 6a. The BIA therefore reiterated its prior conclusion that Martinez Gutierrez was not eligible for cancellation of removal because his own period of lawful permanent residence fell short of the five-year period required by section 1229b(a)(1). *Id.*

Martinez Gutierrez sought review of the BIA's decision in the court of appeals. In the proceedings before the court of appeals, the Government acknowledged that Martinez Gutierrez "has resided in the United States continuously since he arrived in 1989" and represented that "the only eligibility requirement at issue is whether Martinez Gutierrez has been lawfully admitted for permanent residence for not less than five years." Br. for Resp't, *Gutierrez*

v. Holder, No. 08-70436 (9th Cir. July 29, 2010), at 8-9.

The Government also acknowledged that the court of appeals' decision in *Mercado-Zazueta v. Holder*, 580 F.3d 1102, 1113 (9th Cir. 2009), held that a parent's period of residence in a lawful permanent status should be imputed to a minor child for the purpose of satisfying the five-year requirement of section 1229b(a)(1). Br. for Resp't, *Gutierrez v. Holder*, No. 08-70436 (9th Cir. July 29, 2010), at 9. Nevertheless, the Government sought to preserve its position that section 1229b(a)(1) does not permit a parent's period of lawful permanent residence to be imputed to the parent's minor child for the purpose of calculating the child's period of admission as a lawful permanent resident. *Id.*

The court of appeals granted Martinez Gutierrez's petition and remanded the case to the BIA with direction to reconsider Martinez Gutierrez's application for cancellation of removal in light of *Mercado-Zazueta*. Pet. App. 2a. This Court granted certiorari.

SUMMARY OF THE ARGUMENT

The imputation rule serves three key purposes: First, it reflects the widely accepted principle that parents make immigration decisions on behalf of their minor children. Second, it vindicates the immigration law's overarching goal of keeping immediate families together. Third, it interprets section 1229b(a) as consonant with its fundamental purpose of ensuring that lawful permanent residents with strong ties to the United States remain eligible for discretionary cancellation of removal. The BIA's

rigid rule forbidding imputation irrespective of the equities involved is an unreasonable interpretation of the statutory scheme.

The text of section 1229b(a) is silent as to whether imputation of a parent's period of residence or lawful permanent residence to his minor child is permitted for the purpose of satisfying the provision's dual durational requirement. While the Government argues that the plain language of section 1229b(a) is dispositive, it can point to no specific language in the statute that addresses imputation. The Government contends that, because the text of section 1229b(a) refers to the alien whose removal is at issue, that text forecloses imputation from any other individual, even the alien's parent. This argument simply assumes its conclusion. Interpreting section 1229b(a) as permitting imputation would be fully consonant with its plain language. The alien seeking cancellation of removal would still have to satisfy the provision's durational requirements, except that his parent's period of residence or of lawful permanent residence would be factored into the calculation. Notably, a variety of other immigration law provisions (including section 1229b(a)'s predecessor statute, former section 212(c)) use analogous language, and both courts and the BIA have permitted imputation in these contexts. Indeed, this Court has expressly approved of imputation outside the immigration context where the statutory scheme is silent, in order to further the statutory purpose.

The Government's plain language argument is further undermined by the fact that, at the time of section 1229b(a)'s enactment, courts uniformly endorsed imputation of the parents' residency period

to unemancipated minors. There is no indication — as the Government concedes — that in amending the cancellation of removal provision's durational requirement, Congress intended to alter that judicial consensus.

The BIA's rejection of imputation under section 1229b(a) should receive no deference because the BIA did not purport to interpret any statutory ambiguity or to fill a gap left by Congress. Rather, the BIA adopted its no-imputation rule because it believed (erroneously) that such construction was mandated by the plain language of section 1229b(a). Because the BIA did not identify any ambiguity or silence in section 1229b(a) that it attempted to resolve through the application of its specialized expertise, no deference to the agency is warranted.

To the extent deference is permissible, the prior uniform judicial approval of imputation, combined with the absence of any indication that Congress intended to change that interpretation, demonstrates that the Government's construction of section 1229b(a) is unreasonable. In replacing former section 212(c) with section 1229b(a), Congress intended to resolve a deep circuit conflict on an entirely different issue: namely, whether the alien's seven-year period of lawful domicile, required under former section 212(c), must follow the alien's admission to lawful permanent resident status. The dual durational requirement adopted by Congress in section 1229b(a) resolved that split.

While Congress replaced the term "domicile" used in former section 212(c) with the term "residence," that change was not intended to disavow the imputation rule. Although the INA specified that

intent should not be considered in determining residence, it was always settled that a minor's residence is determined by that of his parent. Furthermore, the immigration law recognizes that the concept of "permanent residence" — which section 1229b(a)(2) requires the alien to have for at least five years — contains an element of intent.

The Government's rejection of imputation in the context of minor children of lawful permanent residents contradicts the statute's fundamental policy objectives. The immigration law prioritizes family unity, especially the relationship between parents and their minor children. Moreover, the INA seeks to ensure that individuals with strong ties to the United States — of whom children of lawful permanent residents who are themselves lawful permanent residents are one of the leading examples — can remain in this country. Accordingly, section 1229b(a) is designed to provide relief to aliens who have formed strong ties to the United States. That relief remains entirely discretionary with the Attorney General; section 1229b(a) simply ensures that aliens with strong equities are eligible to apply for this relief.

In a variety of other contexts, the BIA imputes the status or mental knowledge of one person or entity to another as a matter of equity. The BIA's widespread reliance on imputation lessens considerably the degree of deference that its rejection of imputation under section 1229b(a) should receive. Imputation in this context cures inequity and permits vindication of statutory purpose in the unusual circumstance where the alien is the child of a lawful permanent resident and where the relevant time

periods correspond with a period of his minority. There is no sound reason why a statute that authorizes the Attorney General to cancel removal of longtime residents of the United States for equitable reasons should be construed to exclude lawful permanent residents even from consideration for relief, where the delay in their obtaining that status is commonly a product solely of the systemic operation of quotas and the delays inherent in bureaucratic processing of applications. This case illustrates the strong equities that are served by imputation: Martinez Gutierrez had resided in the United States for sixteen years before being served with a Notice of Removal; he was unquestionably eligible for lawful permanent residence from the time his father sought it on his behalf twelve years prior to the Notice of Removal; and his delay in receiving lawful permanent resident status was attributable not to his own actions, but to the visa backlog. This Court should affirm the judgment below.

ARGUMENT

I. Section 1229b(a) Is Silent About Whether Imputation Is Permissible.

Because the BIA interpreted section 1229b(a) in published decisions, this Court assesses that interpretation under the two-step test articulated in *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837 (1984). The first step of the test determines "whether Congress has directly spoken to the precise question at issue" or whether "the statute is silent or ambiguous with respect to the specific issue." 467 U.S. at 842-43. If the statute is "silent or ambiguous," the second step asks whether the

agency's interpretation is based upon a reasonable, "permissible construction of the statute." *Id.* at 843.

As this Court recently explained, in examining the BIA's interpretation of former section 212(c), an agency decision does not merit Chevron deference when the agency fails to "provide a reasoned explanation for its action," *Judulang v. Holder*, 565 U.S. ___, Slip. Op. at 1, 9 n.7 (Dec. 12, 2011). A failure to supply such explanation renders the agency interpretation arbitrary and capricious. This Court reversed the BIA's interpretation of former section 212(c) in the deportation context because the BIA's rule was "unmoored from the purposes and concerns of the immigration laws [in] a matter of utmost importance — whether lawful resident aliens with longstanding ties to this country may stay here." *Id.* at 21. The Court emphasized, moreover, that it would have reached the same result under step two of *Chevron*, where it considers "whether an agency interpretation is 'arbitrary or capricious in substance.'" *Id.* at 9 n.7 (quoting *Mayo Found. for Med. Educ. & Research v. United States*, 562 U.S. ___, 131 S. Ct. 704, 711 (2011)) (internal quotation marks omitted).

The Government is correct that statutory interpretation "'must begin with the plain language of the statute.'" Petr. Br. 15 (quoting *Negusie v. Holder*, 555 U.S. 511, 542 (2009)). But the text of section 1229b(a) is entirely silent about whether a parent's years of status or residence may be imputed to his child to satisfy the statute's dual durational requirements. The language of section 1229b(a) neither expressly permits nor bars imputation; it simply does not address this question. For this

reason, no circuit court has adopted the Government's interpretation of section 1229b(a) as foreclosing imputation by its plain terms. On the contrary, courts have concluded that section 1229b(a) is silent on the question and based their holdings on *Chevron* deference rather than the statutory language. *See Augustin v. Att'y Gen.*, 520 F.3d 264, 269 (3d Cir. 2008) ("The cancellation of removal provision neither provides for such imputation nor disallows it."); *Cuevas-Gaspar*, 430 F.3d at 1022 ("Section 1229b is silent as to whether a parent's status may be imputed to the parent's unemancipated minor child for purposes of satisfying the requirements of subsections (a)(1) and (a)(2)."); *Deus v. Holder*, 591 F.3d 807, 810-11 (5th Cir. 2009).

The Government argues that section 1229b(a)'s reference to "*the* alien" whose removal is at issue unambiguously precludes imputation. Petr. Br. 16-17 (addressing section 1229b(a)(2)); *id.* at 18 (addressing section 1229b(a)(1)). But this definite article cannot bear the interpretive weight that the Government places on it. This definite article simply indicates that section 1229b(a) is concerned with the specific alien for whom cancellation of removal is being considered. Petr. Br. 16. That concern will remain the case irrespective of whether a period of residence of the alien's parent may be imputed to him. The Government's argument simply assumes its conclusion.

As the Government concedes, courts have permitted imputation under section 1229b(a)'s predecessor statute, former section 212(c) of the INA, 8 U.S.C. § 1182(c) (1988). Petr. Br. 35 (citing *Lepe-Guitron*, 16 F.3d at 1025-26); *see also Morel*, 90 F.3d

at 841; *Rosario*, 962 F.2d at 224-25; *supra* at 9. By its terms, former section 212(c), which provided for a discretionary waiver from inadmissibility of deportation for "[a]liens lawfully admitted for permanent residence ... who are returning to a lawful unrelinquished domicile of seven consecutive years," 8 U.S.C. § 1182(c) (1988), also referred only to the aliens whose inadmissibility or deportation was at issue, not to their parents. The circuit courts so understood former section 212(c). *See Morel*, 90 F.3d at 837 ("Section 212(a) identifies those classes of aliens who are ineligible to receive visas and are excluded from admission to the United States."); *Lepe-Guitron*, 16 F.3d at 1023; *Rosario*, 962 F.2d at 223. Nevertheless, these courts concluded that former section 212(c) permitted imputation of a parent's period of legal domicile to these aliens in the instances where the aliens were minor children.

In addition, the BIA has interpreted other provisions of immigration law that use the definite article "the" when referring to an alien as permitting imputation to minors. Thus, the BIA imputes parental knowledge of inadmissibility to a minor child for the purposes of determining whether the child would qualify for a waiver of removal under 8 U.S.C. § 1182(k), a provision that permits a waiver if the alien did not know or could not have known of facts establishing his inadmissibility. *See Senica v. INS*, 16 F.3d 1013, 1014 (9th Cir. 1994); Petr. Br. 39: Section 1182(k) permits the Attorney General to waive inadmissibility if he concludes that "inadmissibility was not known to, and could not have been ascertained by the exercise of reasonable diligence by, *the immigrant* before the time of departure." 8 U.S.C. § 1182(k) (emphasis added).

Under the Government's logic, this statutory text would unambiguously foreclose imputation.

The Government's reliance on section 1229b(a)(1)'s phrase "lawfully admitted for permanent residence," Petr. Br. 18, is similarly unavailing. This precise phrase was also used by former section 212(c), and was defined at the time in the INA in exactly the same way as it is defined presently, as "the status of having been lawfully accorded the privilege of residing permanently in the United States, ... such status not having changed." 8 U.S.C. § 1101(a)(2); *see also* Petr. Br. 18-19; *Rosario*, 962 F.2d at 222. Nonetheless no court has viewed that phrase as foreclosing the imputation under former section 212(c).[6]

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[6] For the same reason, the Government's reliance on section 1229b(a)(2)'s analogous phrase "after having been admitted," Petr. Br. 17, is similarly unavailing. If section 1229b(a) is construed to permit imputation, then the parent's period of residence after "having been admitted" may be imputed to a minor. The Government asserts that this requirement makes imputation of his father's residence period to Martinez Gutierrez particularly inappropriate because, the Government speculates, Martinez Gutierrez did not attain any lawful status (or "admission") until he was granted lawful permanent resident status in 2003. *Id.* But because Martinez Gutierrez's eligibility under section 1229b(a)(2) was not at issue before the BIA or the Ninth Circuit, neither considered the question of his status prior to becoming a lawful permanent resident. Indeed, the LIFE Act, which permitted Martinez Gutierrez to legalize his status, created a temporary nonimmigrant "V" status for minor children of lawful permanent residents waiting for longer than three years for an immigrant visa based on their parent's previously filed petition. 8 U.S.C. §§ 1101(a)(15)(V); 1255(i); *supra* at 6. Because his father filed a petition for Martinez Gutierrez in

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Finally, the Government relies on the use of the possessive pronoun "his" in the INA's definition of "residence" as "the place of general abode," with the further explanation that "'the place of general abode of a person means his principal, actual dwelling place in fact, without regard to intent.'" Petr. Br. 17 (quoting 8 U.S.C. § 1101(a)(33)). The use of the pronoun "his" is not determinative of whether imputation is permissible. Again, other provisions of the immigration law use this and similar pronouns, including when referring to the alien's "residence" in a particular country. *See, e.g.*, 8 C.F.R. § 208.15 ("[a]n alien is considered to be firmly resettled if, prior to arrival in the United States, *he or she* entered into another country with [some] type of permanent resettlement, unless *he or she* establishes" certain facts regarding "*his or her* entry into that country" or "the conditions of *his or her* residence in that country") (emphasis added). As the Government concedes (Petr. Br. 39), the BIA has nevertheless allowed imputation in these contexts.

In a variety of other contexts, courts impute the conduct of one person or entity to another to vindicate statutory purposes, even though the relevant statutory language does not explicitly provide for such imputation. This Court has expressly approved of this practice, for example in the context of the "responsible corporate officer" doctrine. In *United States v. Dotterweich*, 320 U.S. 277 (1943), the relevant statute made it a misdemeanor for "a

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September 1993, *see supra* at 10-11, Martinez Gutierrez could have been eligible for that status.

person" to introduce or deliver into interstate commerce any adulterated or misbranded drug. *Id.* at 278. This Court held that the acts of the corporation could be imputed to a responsible corporate officer even though he did not personally commit the offense. Noting that "[l]iteralism and evisceration are equally to be avoided," *id.* at 284, the Court explained that Congress intended to impose liability "upon those who have at least the opportunity of informing themselves of the existence of conditions imposed for the protection of consumers before sharing in illicit commerce, rather than to throw the hazard on the innocent public who are wholly helpless," *id.* at 285. *See also, e.g., Staples v. United States*, 511 U.S. 600, 607 (1994) (noting that the Court has looked to "*the nature of the statute* ... to determine whether congressional silence concerning the mental element of the offense should be interpreted as dispensing with conventional *mens rea* requirements") (first emphasis added); *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 567 (1982) (a principal is liable for the acts of an agent in order to provide protection to persons dealing with the agent); *United States v. Park*, 421 U.S. 658, 673-74 (1975) (the knowledge of a corporation may be imputed to a corporate officer in order to protect the public interest). Courts apply imputation as a matter of equity, consistent with the underlying statutory purpose.

Tacitly admitting the weakness of its plain-language argument, the Government acknowledges that "Section 1229b(a) does not expressly prohibit imputation." Petr. Br. 20. Instead, the Government contends that "the lack of an express bar cannot be read as affirmatively authorizing imputation." *Id.*

This argument, however, is beside the point. The question is not whether section 1229b(a)'s silence on the issue "affirmatively authorizes" imputation; by definition, congressional silence on a particular issue cannot provide such express authorization. Rather, the question is whether, by not expressly addressing the question of imputation in section 1229b(a), the plain text of the statute affirmatively *forecloses* that possibility.

Notably, the Government can point to no language in section 1229b(a) that forecloses imputation. Instead, the Government invokes entirely dissimilar situations, such as the Third Circuit's invalidation of the BIA regulation that extended 8 U.S.C. § 1101(a)(42) — the provision granting refugee status to victims of forced sterilization — to the victims' spouses, absent any congressional authorization to do so. Petr. Br. 20 (citing *Lin-Zheng v. Att'y Gen.*, 557 F.3d 147, 156 (3d Cir. 2009)). The Third Circuit rejected the BIA's interpretation as irreconcilable with the statutory language because "'the statutory scheme *unambiguously dictates* that applicants can become candidates for asylum relief only based on persecution status that *they themselves* have suffered,'" and because the BIA openly acknowledged that it has "'put aside' the very statutory text that should have controlled its inquiry into congressional intent." *Lin-Zheng*, 557 F.3d at 156-57 (citation omitted) (emphasis added). By contrast, nothing in

section 1229b(a) "unambiguously dictates" that imputation is impermissible.[7]

Moreover, the context of section 1229b(a)'s enactment (*supra* at 8-10, 21-22) precludes the Government's argument that the text of section 1229b(a) forbids imputation. "The construction of statutory language often turns on context," *FCC v. AT&T Inc.*, 131 S. Ct. 1177, 1182 (2011), and that context includes "the 'contemporary legal context' in

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[7] The Government also invokes the Ninth Circuit's refusal to permit imputation in *Barrios v. Holder*, 581 F.3d 849, 865 (9th Cir. 2009), which, the Government asserts, involved an INA provision "providing similar cancellation-of-removal relief." Petr. Br. 21. *Barrios*, however, involved a very different requirement of continuous "physical presence," which "does not require a specific 'status, intent, or state of mind,'" and the Ninth Circuit carefully distinguished this requirement from its precedents permitting imputation under section 1229b(a). 581 F.3d at 862-63. Moreover, while the Ninth Circuit observed that the continuous-physical-presence provision was not ambiguous, it did so in the course of determining whether to apply the interpretive canon that any statutory ambiguity must be read in the light most favorable to the alien, *id.* at 865; the question of deference to the BIA did not even arise because the BIA had not addressed the imputation issue, *id.* at 859-60. Similarly unavailing is the Government's reliance, Petr. Br. 21 n.4, on the Third Circuit's decision in *DeLeon-Ochoa v. Attorney General*, 622 F.3d 341 (3d Cir. 2010). *DeLeon-Ochoa* also concerned a very different statute: one containing both continuous-residence and continuous-physical-presence requirements for aliens seeking Temporary Protected Status (TPS). *Id.* at 353-56. By contrast, the Third Circuit previously held that section 1229b(a) "is silent" on the imputation question, *Augustin*, 520 F.3d at 269, a conclusion that *DeLeon-Ochoa* did not question. Other courts, moreover, interpreted the TPS statute's continuous-residence requirement under the *Skidmore* deference standard. *Cervantes v. Holder*, 597 F.3d 229, 236-37 (4th Cir. 2010).

which Congress enacted" the statute, *Cottage Savings Ass'n v. Comm'r*, 499 U.S. 554, 562 (1991) (citation omitted). Specifically, where Congress "adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Lorillard Div. of Loew's Theatres, Inc. v. Pons*, 434 U.S. 575, 581 (1978).

Courts construing section 1229b(a)'s predecessor section, former section 212(c), have uniformly held that a parent's period of legal residency could be imputed to a child for the purpose of satisfying former section 212(c)'s seven-year unrelinquished domicile requirement. *See Morel*, 90 F.3d at 841; *Lepe-Guitron*, 16 F.3d at 1026; *Rosario*, 962 F.2d at 224-25; *supra* at 9, 21-22. "Congress is presumed to be aware of a[] judicial interpretation of a statute." *Forest Grove Sch. Dist. v. T.A.*, 129 S. Ct. 2484, 2492 (2009) (internal quotation marks and citation omitted). The Government points to no evidence, whether in the statutory text of section 1229b(a) or in its legislative history, that Congress intended to alter this judicial consensus and forbid imputation in this context. *See also Augustin*, 520 F.3d at 269 n.5 (section 1229b(a)'s "legislative history does not provide support for [an] inference" "that Congress in IIRIRA eliminated the word 'domicile' in favor of 'residence' in order to eliminate imputation."). Indeed, the Government concedes that section 1229b(a) "was crafted 'to resolve a circuit split that did not concern imputation.'" Petr. Br. 25 (quoting *Mercado-Zazueta*, 580 F.3d at 1110). Had Congress intended to overturn a uniform conclusion of the circuit courts, "it knew how to do so." *Touche Ross &*

Co. v. Redington, 442 U.S. 560, 572 (1979). Thus, even if section 1229b(a) is not viewed as having codified the existing imputation rule, *Cottage Savings Ass'n*, 499 U.S. at 562, it is at least silent as to its continuing validity.[8]

II. No Deference to the BIA Is Warranted Because the BIA Did Not Interpret a Statutory Ambiguity.

As a fall-back position, the Government urges this Court to defer to the BIA's anti-imputation rule under the second step of *Chevron* as a reasonable construction of section 1229b(a). Petr. Br. 33. But deference is inappropriate here, because the BIA did not purport to interpret a "silent or ambiguous statute" by applying its specialized expertise. *Chevron*, 467 U.S. at 843. Rather, the BIA rejected imputation under section 1229b(a) because it believed (erroneously) that this result was mandated by the plain language of the statute. In such a situation, where the agency wrongly believed itself to be compelled by the statutory text, no *Chevron* deference is warranted.

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[8] Nor is there merit to the Government's argument that the structure of section 1229b's statutory scheme unambiguously forecloses imputation because otherwise "the same alien could be considered to have two different dates for which he was lawfully admitted for permanent residence." Petr. Br. 22-23. As the Government concedes (Petr. Br. 23 n.6), the INA permits the same alien to have different admission dates, with only one of these dates being the relevant one for the purpose of determining the alien's removability. *In re Alyazji*, 25 I. & N. Dec. 397, 405-08 (B.I.A. 2011).

The BIA first examined the imputation rule in a published decision in *In re Escobar*, 24 I. & N. Dec. 231 (B.I.A. 2007). There, the BIA considered whether it should apply the rationale of *Cuevas-Gaspar*, which permitted imputation with respect to the seven-year durational requirement of section 1229b(a)(2), to the five-year requirement of section 1229b(a)(1) as well. *Id.* at 232-33. The BIA rejected this approach on the grounds that it "runs *contrary to the clear language of the statute*, which requires an alien to be lawfully admitted for permanent residence, in his or her own right, for no less than 5 years and to have 7 years of residence after any admission." *Id.* at 235 (emphasis added); *see also id.* at 234 ("[a]llowing the status of a parent to simply attach to a child, without regard to the mandated statutory and regulatory application process and the substantive eligibility requirements for admission, *would run contrary to the clear intent of Congress*") (emphasis added).[9]

Although *In re Escobar* involved only the permissibility of imputation for the purposes of satisfying the five-year requirement of section 1229b(a)(1), *id.* at 232, the BIA viewed this decision as rejecting the imputation rule for the purposes of satisfying section 1229b(a)(2) as well. *Id.* at 235; *In re Ramirez-Vargas*, 24 I. & N. Dec. 599, 600 (B.I.A. 2008) (refusing to apply the imputation rule in order to satisfy section 1229b(a)(2)'s seven-year

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[9] The BIA also sought to buttress its rejection of the imputation rule by arguing that it "would also run counter to the legislative history," *In re Escobar*, 24 I. & N. Dec. at 235 — one of the "traditional tools of statutory construction" that courts use at the first step of the *Chevron* inquiry. 467 U.S. at 843 n.9.

requirement on the grounds that *In re Escobar* rejected the interpretation adopted in *Cuevas-Gaspar*). In neither decision did the BIA purport to exercise any discretion to fill a statutory gap or resolve any statutory ambiguity.

"[D]eference to an agency's interpretation of a statute is not appropriate when the agency wrongly believes that interpretation is compelled by Congress." *Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 (D.C. Cir. 2006) (quoting *PDK Labs., Inc. v. DEA*, 362 F.3d 786, 798 (D.C. Cir. 2004); *Ariz. v. Thompson*, 281 F.3d 248, 254 (D.C. Cir. 2002) (internal quotation marks omitted); and citing *ITT Indus., Inc. v. NLRB*, 251 F.3d 995, 1004 (D.C. Cir. 2001); *Transitional Hosps. Corp. v. Shalala*, 222 F.3d 1019, 1028-29 (D.C. Cir. 2000); *Alarm Indus. Commc'ns Comm. v. FCC*, 131 F.3d 1066, 1072 (D.C. Cir. 1997); *Teva Pharms. USA, Inc. v. FDA*, 441 F.3d 1, 4-5 (D.C. Cir. 2006); *Prill v. NLRB*, 755 F.2d 941, 956-57 (D.C. Cir. 1985)). This is so because "*Chevron* step 2 deference is reserved for those instances when an agency recognizes that the Congress's intent is not plain from the statute's face." *Peter Pan Bus Lines*, 471 F.3d at 1354. Moreover, as this Court explained, "one of the principal justifications behind *Chevron* deference" is deference to "practical agency expertise." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651-52 (1990) (citing *Chevron*, 467 U.S. at 865). To receive deference, the agency "must bring its experience and expertise to bear" to resolve a statutory ambiguity or fill a gap left by Congress. *PDK Labs.*, 362 F.3d at 797-98 (citing *Chevron*, 467 U.S. at 865-66). When the agency does so, it receives deference, provided its reading of the statute is reasonable.

Here, by contrast, the BIA did not identify any ambiguity or silence in section 1229b(a) that it sought to clarify. Nor did the BIA seek to justify its reading of section 1229b(a) by invoking its specialized expertise in the administration of the INA. Rather, the BIA believed its construction of section 1229b(a) to be compelled by "the clear language of the statute." *In re Escobar*, 24 I. & N. Dec. at 235. Therefore, this is not a circumstance where deference to the BIA is warranted.

In the absence of an agency construction to which it should defer, this Court may interpret section 1229b(a) on its own. If it does so, it should hold that the construction most consonant with the statutory text and congressional intent is one that permits imputation of a parent's status and residence to his minor child. Because, however, this question may involves "policy choices that agencies are better equipped to make than courts," *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005), and because "the BIA has not yet exercised its *Chevron* discretion to interpret the statute in question," the Court may appropriately remand this case to the agency. *Negusie v. Holder*, 555 U.S. 511, 523 (2009).

III. The BIA's Interpretation of Section 1229b(a) as Foreclosing Imputation to Minors Is Unreasonable.

To the extent the BIA may claim deference to its construction of section 1229b(a), this Court assesses whether the BIA's interpretation "is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 842-43. In doing so, the Court applies the traditional tools of statutory construction and

considers the provision's language, statutory context, legislative history, and policy considerations. *See id.* at 843-66. Such review compels the conclusion that the BIA's interpretation of section 1229b(a) as prohibiting imputation is unreasonable. *Cf. Judulang v. Holder*, 565 U.S. ___, Slip. Op. at 9, 21.

A. Section 1229b(a) Was Not Intended To Alter the Uniform Judicial Interpretation that Permitted Imputation Under the Predecessor Statute.

Former section 212(c), the predecessor statute to section 1229b(a), required the alien applying for a cancellation of deportation to demonstrate that he had seven years of unrelinquished domicile in the United States. The circuit courts that have interpreted former section 212(c) in the context of minors' seeking cancellation of removal uniformly held that a parent's legal status could be imputed to a child. *See Morel*, 90 F.3d at 841; *Lepe-Guitron*, 16 F.3d at 1026; *Rosario*, 962 F.2d at 224-25; *supra* at 9, 21-22, 28. These courts reasoned that a child is incapable of forming the intent necessary to establish domicile and, therefore, a child's domicile necessarily follows that of his parent. *Morel*, 90 F.3d at 840-41; *Lepe-Guitron*, 16 F.3d at 1025; *Rosario*, 962 F.2d at 224.

Moreover, these courts acknowledged that permitting imputation of a parent's legal status to a child served important congressional objectives. Critically, imputation furthered the INA's goal of family unity by allowing a child to remain in the United States with his parent. *Morel*, 90 F.3d at 841 ("[v]arious provisions of the INA reflect Congress'

intent to prevent the unwarranted separation of parents from their children"); *see also* 8 U.S.C. § 1182(a)(6)(E)(ii) (waiving excludability for aliens that assisted children in entering the United States illegally); 8 C.F.R. § 245.1(e)(2)(vi)(B)(1) (granting children applying for permanent residency from outside the United States the same priority date and preference category as their parents).

The family-unity objective applies with special force in the context of lawful permanent residents and their children, because these families have chosen to make the United States their permanent home. *Lepe-Guitron*, 16 F.3d at 1025 (the INA gives "high priority to the relation between permanent resident parents and their children").

Accordingly, when imputing the parent's duration of domicile to a minor child, courts emphasized the strong tie that the children of lawful permanent residents have formed to the United States, their adoptive home. A child residing with his parent in the United States has a significant relationship "with the parent — and, by extension, with this country — [which] evinces the type of bond that the statute was designed to protect from unwarranted severance." *Rosario*, 962 F.2d at 224; *see also Lepe-Guitron*, 16 F.3d at 1025 ("Because children naturally form the strongest of ties to the place where their parents are domiciled and they with them, section 212(c)'s core policy concerns would be directly frustrated by the government's proposal to ignore the parent's domicile in determining that of the child.").

Although circuit courts uniformly agreed that former section 212(c) permitted imputation of a parent's permanent resident status to his child, they

were sharply divided over whether the required seven-year period of "lawful unrelinquished domicile" had to follow the alien's admission as a lawful permanent resident or whether the period prior to that admission also could count to satisfy that requirement. *See Mercado-Zazueta*, 580 F.3d at 1107 (describing the circuit split); *supra* at 9-10.

To resolve this protracted conflict, Congress replaced former section 212(c) with current section 1229b(a). *See* 141 Cong. Rec. at S6092, *et seq.* (May 3, 1995).[10] As the Department of Justice explained, the amendment of former section 212(c) was designed to "clarify an area of the law regarding the cutoff periods for these benefits that have given rise to significant litigation and different rules being applied in different judicial circuits." 141 Cong. Rec. at S6104. There is no indication that Congress viewed the imputation rule as a cause for concern. Nor is there any suggestion that, in replacing former section 212(c) with section 1229b(a), Congress meant to overturn the established judicial consensus that permitted imputation of a parent's period of domicile to a child.

Rather, Congress was concerned solely with the circuit split concerning former section 212(c)'s requirement permitting discretionary cancellation of

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[10] Because no legislative history is available for the Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, which enacted Section 1229b(a), the history of the precursor bill, the Immigration Enforcement Improvements Act, S. 754, 104th Cong. (1995), is informative as to the legislative intent behind the provision. *See Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 370-71 (1980); Petr. Br. 26.

removal where an alien has been "lawfully admitted for permanent residence" and had "a lawful unrelinquished domicile of seven consecutive years. 8 U.S.C. § 1182(c). To resolve the widespread disagreement among circuits on the application of this rule, Congress amended former section 212(c) by creating a dual durational requirement. Under section 1229b(a), an alien is eligible for discretionary cancellation of removal only if he meets both the five-year lawful permanent residence requirement and the seven-year continuous residency requirement. 8 U.S.C. § 1229b(a)(1), (2).

Although in instituting this dual durational requirement, Congress replaced the seven-year *domicile* requirement with the seven-year continuous *residence* requirement, there is no indication that Congress intended this change to alter the circuit courts' uniform position that a parent's legal status could be imputed to a minor child. *See Augustin*, 520 F.3d at 269 n.5. Indeed, the Government concedes as much, admitting that "there is no indication that the imputation issue was ever called to the attention of Congress." Petr. Br. 27 (citation omitted).[11]

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[11] The Government argues that Congress' generalized concern of ensuring that the more limited form of relief provided in IIRIRA be respected counsels in favor of rejecting imputation under section 1229b(a). Petr. Br. 27 (citing statement of Rep. Lamar Smith). But if Congress was concerned that the new durational requirements imposed by section 1229b(a) would be subverted through imputation from parents to minors, it would have surely addressed that issue by expressly foreclosing imputation. Congress was aware that courts uniformly permitted imputation, yet, as the Government concedes (Petr. Br. 27), there is no indication that Congress viewed that as a potential problem.

If Congress had intended to effect such a significant change in the implementation of the cancellation-of-removal provision towards minors, and to abrogate the established judicial rule permitting imputation, Congress would have expressed its intent clearly. "'Congress is presumed to be aware of a[] judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.'" *Forest Grove Sch. Dist.*, 129 S. Ct. at 2492 (quoting *Lorillard,* 434 U.S. at 580). Although Congress amended the cancellation-of-removal provision, it did not adopt any language disavowing the imputation rule. This Court should not read congressional silence as evidence of congressional intent to overturn the established judicial construction of the cancellation-of-removal provision as permitting imputation of their parents' durational periods of residence to minor children. *See Newton v. Comm'rs*, 100 U.S. 548, 562 (1879) (the Court will not "interpolate into the statute a thing so important, which it does not contain"). If Congress did not intend to overturn the imputation rule when it amended the cancellation-of-removal provision, it is unreasonable for the BIA to change the imputation rule post-enactment.

The Government contends that residence "differs fundamentally" from domicile because, unlike domicile, residence under the INA is not defined by reference to intent. Petr. Br. 28; *see* 8 U.S.C. § 1101(a)(33) (defining the term "residence" as the alien's "principal, actual dwelling place in fact, without regard to intent"). The Government ignores that section 1229b(a) does not use the unqualified term "residence" but refers instead to "permanent residence" and "resided ... continuously," 8 U.S.C.

§ 1229b(a)(1), (2), and this Court has recognized a distinction between residence and permanent residence (with the latter connoting intent). *See Savorgnan v. United States*, 338 U.S. 491, 504-05 (1950). Indeed, the INA defines the term "permanent" as "a relationship of continuing or lasting nature, as distinguished from temporary." 8 U.S.C. § 1101(a)(31). A determination of whether the relationship between an alien and a specific residence will be "of continuing and lasting nature" necessarily entails an inquiry into that individual's intent. Because "[c]hildren ... normally lack the material and psychological wherewithal to decide where they will reside," *Mozes v. Mozes*, 239 F.3d 1067, 1076 (9th Cir. 2001), it is reasonable to impute the residence of the parent to the child.[12]

Regardless, the pre-existing imputation rule never turned solely on the question of whether children can form intent. Indeed, courts imputed not only the parent's intent, but the parent's status and

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[12] "Although the meaning may vary according to context, 'residence' generally requires both physical presence *and an intention to remain*." *Martinez v. Bynum*, 461 U.S. 321, 330 (1983) (emphasis added); *see also Carrington v. Rash*, 380 U.S. 89, 93-94 (1965) (a state resident is someone who intends to make the state his home indefinitely); *Pope v. Williams*, 193 U.S. 621, 621, 632 (1904) (an individual is only eligible to vote if he intends to establish residency and citizenship within the state), *overruled on other grounds by Dunn v. Blumstein*, 405 U.S. 330 (1972). This Court has also recognized intent as an element to establishing residence in the context of welfare benefits. *Shapiro v. Thompson*, 394 U.S. 618, 636 n.16 (1969), *overruled in part by Edelman v. Jordan*, 415 U.S. 651 (1974); *see also Saenz v. Roe*, 526 U.S. 489, 517 (1999) (residency requires both physical presence and an intent to remain).

duration of residency. In imputing the parents' years of "*lawful* unrelinquished domicile" to their minor children under former section 212(c), the courts necessarily imputed the parents' lawful status as well as their years of residence in order to satisfy the statutory seven-year requirement. *See Morel*, 90 F.3d at 837, 842 (allowing the imputation of four years of the mother's lawful domicile, accumulated prior to the child's entering the United States, in order to satisfy the seven-year domicile requirement); *Lepe-Guitron*, 16 F.3d at 1024, 1026 (allowing imputation of the parents' years of legal permanent residence to establish the minor's seven years of lawful unrelinquished domicile); *Rosario*, 962 F.2d at 222, (allowing imputation of the mother's period of lawful residence in the eleven months prior to the minor's lawful admission to permanent resident status pending evidence of his significant relationship with the mother). As explained more fully in the following sections, the driving force of the imputation rule is equity: the prevailing national immigration policy of family unity, and the curing of anomalies that arise from systemic delays in adjusting a child's status to that of the parent. The inequity of the BIA's interpretation is that, for no discernible policy reason, it sweeps in individuals like Martinez Gutierrez who do not require imputation of their parents' residency (having long resided in the U.S. themselves), but only the imputation of the parent's lawful permanent resident status to which most children will eventually accede.

B. The BIA's Interpretation of Section 1229b(a) Contradicts the Statutory Objective of Providing Relief to Aliens with Strong Ties to the United States.

The imputation rule focuses on a narrowly defined category of immigrants: children of lawful permanent residents who themselves have been admitted as lawful permanent residents. These individuals are among the aliens with the strongest connection to the United States, because both they and their families have chosen to make the United States their adoptive home. The BIA's rule that disallows imputation in this context is unreasonable because it contradicts section 1229b(a)'s objective of providing relief to aliens with strong ties to the United States. Imputation is an equitable doctrine, yet the BIA's rule disregards the strong equities of these immigrants without any legitimate justification.

The purpose of the time requirements in both section 1229b(a) and in its predecessor, former section 212(c), is to provide relief to aliens who have formed strong ties to the United States. *Mercado-Zazueta*, 580 F.3d at 1113 (noting "the longstanding 'congressional policy of recognizing that presence in the United States of an extended length gives rise to such strong ties to the United States that removal would result in undue hardship'") (quoting *Cuevas-Gaspar*, 430 at 1029). Imputing a lawful permanent resident parent's duration of residence or status to his lawful permanent resident child directly furthers this statutory aim. *Cf. Lepe-Guitron*, 16 F.3d at 1025 (Section "212(c) was enacted to provide relief from

deportation for those who have lawfully formed strong ties to the United States.") (citing S. Rep. No. 1515, 81st Cong., 2d Sess. 383 (1950)); *Rosario*, 962 F.2d at 224 ("the ameliorative purpose of § 212(c) is better served by permitting a minor to establish domicile through a parent with whom he had a significant relationship during the time in question" because "[t]his connection with the parent — and, by extension, with this country — evinces the type of bond that the statute was designed to protect from unwarranted severance").

By contrast, refusing to impute a parent's status "'frustrates the legislative scheme because it works to prevent those who *have* developed close ties to the United States ... from being able to seek a waiver.'" *White v. INS*, 75 F.3d 213, 216 (5th Cir. 1996) (quoting *Rosario*, 962 F.2d at 225). Martinez Gutierrez was a lawful permanent resident at the time he was served with a Notice of Removal in 2005, and he had resided continuously in the United States for sixteen years prior to that point. *Supra* at 10. He has significant ties to the United States, in contrast to his highly attenuated (if any) connection to his native country, Mexico. *See supra* at 10. As the BIA has previously acknowledged, "drastic deprivation may follow if a resident of the United States is compelled to forsake all bonds formed in this country and go to a foreign land where the resident often has no current ties." *In re Huang*, 19 I. & N. Dec. 749, 754 (B.I.A. 1988). Imputing the duration of lawful permanent residence and continuous residence from Martinez Gutierrez's father (himself a lawful

permanent resident) to Martinez Gutierrez directly serves section 1229b(a)'s purposes.[13]

A prohibition on imputation is particularly unreasonable in the case of a lawful permanent resident such as Martinez Gutierrez, who failed to satisfy section 1229b(a)'s durational requirements because of the delay in the availability of his immigrant visa number. The Government contends that Martinez Gutierrez should not benefit from the imputation rule because he was not granted lawful permanent status until the age of nineteen. Petr. Br. 30. But this argument ignores entirely the fact that Martinez Gutierrez and similarly situated children did not delay applying for a lawful permanent status earlier through any fault of their own; rather, the delay was solely a result of the visa backlog. Martinez Gutierrez's father, who became a lawful permanent resident in 1991, promptly sought lawful permanent status for his son in September 1993, when Martinez Gutierrez was nine years old. *Supra* at 10-11. Upon approval of his father's I-130 petition, Martinez Gutierrez became eligible to apply for adjustment of status as soon as an immigrant visa number became available to him. *Supra* at 4, 11.

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[13] Instances where courts refused to impute a parent's period of residence often involve wholly different facts. Thus, in *Cervantes v. Holder*, 597 F.3d 229, 237 (4th Cir. 2010), the children at issue did not enter the country with their parents and had only recently arrived in the United States. *See also Barrios*, 581 F.3d at 858 (refusing to impute a parent's physical presence to a minor child who was not actually living in the United States during the statutory seven-year period). In contrast, Martinez Gutierrez has resided in the United States continuously since 1989. *Supra* at 10.

This visa number did not become available until more than five years later, in May 1999. *Supra* at 11. Had that number been available in 1993, when Martinez Gutierrez's father filed the I-130 petition for him, Martinez Gutierrez in all likelihood would have easily satisfied both durational requirements of section 1229b(a).[14]

The availability of an immigrant visa number, however, is not a matter of executive discretion. A visa will invariably become available as a matter of course, with the delay being simply a function of the visa backlog created by the overall size of family-based immigration into the United States. *See* Petr. Br. 31-32 & n.10; *supra* at 3-5. Moreover, the approval of an application for adjustment of status filed by a second-level preference alien (such as a minor child of a lawful permanent resident) is largely a ministerial function. It is therefore unreasonable for the BIA to disregard entirely section 1229b(a)'s objective of providing relief to aliens with strong ties to the United States merely because, due to the visa backlog, such aliens were delayed in submitting their applications for adjustment of status.[15]

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[14] Martinez Gutierrez filed his I-485 application for adjustment of status in February 2001, and was informed in May 2001 that this status "ha[s] been granted." *Supra* at 12.

[15] The Government's argument that Martinez Gutierrez "did not seek to benefit from imputation of his father's LPR status and residence until after he was apprehended and placed in removal proceedings," Petr. Br. 30, is therefore difficult to comprehend. The question of imputation under the cancellation-of-removal statute does not arise until the alien has a reason to seek cancellation of his removal. Nor would Martinez Gutierrez have any need to "benefit" from the imputation rule if he had been

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The refusal to impute is particularly unreasonable with respect to Martinez Gutierrez's eligibility under the seven-year residence requirement of section 1229b(a)(2). The LIFE Act expressly created a temporary nonimmigrant "V" status for minor children of lawful permanent residents who, like Martinez Gutierrez, were waiting for longer than three years for an immigrant visa based on their parent's previously filed petition. 8 U.S.C. §§ 1101(a)(15)(V); 1255(i); *supra* at 6. Moreover, aliens who apply for adjustment of status are considered to be "present in the United States under a period of stay authorized by the Attorney General." LIFE Act at § 1502(a)(1)(C); 8 C.F.R. § 245a.34(d); *supra* at 6. These provisions of the immigration law further support the court of appeals' rule of imputing the residence period from lawful permanent residents to their minor children (who are themselves lawful permanent residents). For this reason, the imputation rule is not an "end-run," Petr. Br. 32, around the statutory limitations on obtaining lawful status.

C. The Imputation Rule Furthers Congress' Important Goal of Promoting Family Unity in the Immigration Context.

The imputation rule furthers the congressional intent embodied to place "a high priority on relations

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(...continued)

able to seek adjustment of status immediately upon the approval of his father's I-130 petition, filed in September 1993, instead of waiting for over five years for an available immigrant visa number.

between permanent legal residents and their children." *Cuevas-Gaspar*, 430 F.3d at 1025-26. The integrity of the family unit is of cardinal importance in American law. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). Raising one's children is deemed essential to liberty — a right "far more precious ... than property rights." *May v. Anderson*, 345 U.S. 528, 533 (1953).

The immigration law has long recognized the importance of family unity. *Fiallo v. Bell*, 430 U.S. 787, 795 n.6 (1977) (noting congressional objective "'of keeping families of United States citizens and immigrants united'") (quoting H.R. Rep. No. 85-1199, at 7 (1957), *reprinted in* 1957 U.S.C.C.A.N. 2016, 2020)); *see also* Stephen H. Legomsky & Cristina M. Rodriguez, *Immigration and Refugee Law and Policy* 262 (5th ed. 2009) ("[O]ne central value that United States immigration laws have long promoted ... is family unity."); Jennifer M. Chacón, *Loving Across Borders: Immigration Law and the Limits of Loving*, 2007 Wis. L. Rev. 345, 358 (2007) ("family reunification is a central part of United States immigration law"). Congress was expressly cognizant of this objective when it enacted section 1229b(a) as part of IIRIRA. *See Reform of Legal Immigration: Hearing Before the Subcomm. on Immigration of the S. Comm. on the Judiciary*, 104th Cong. 13 (Sept. 13, 1995) (statement of Doris Meissner, Comm'r, INS) ("[f]amily reunification has been the centerpiece of our legal immigration system for decades, and it should remain so").

Through the INA, Congress intended not only "to preserve the family unit" but also "to provide for a liberal treatment of children" in particular. H.R. Rep.

No. 85-1199, 1957 U.S.C.C.A.N. at 2020-21 (1957). Indeed, as Congress stressed at the time of the INA's enactment, "the underlying intention of our immigration laws [is] the preservation of the family unit." H.R. Rep. No. 82-1365, at 24 (1952). Moreover, Congress emphasized that "any new immigration law should provide a better method of keeping families of immigrants together by affording a more liberal treatment of children." S. Rep. No. 8-1515, at 468 (1952); *see also* H.R. Rep. No. 89-745, at 12 (1965) ("Reunification of families is emphasized as the foremost consideration [of the legislation]."); *cf. Prince v. Mass.*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.").

The INA is replete with special preferences promoting the goal of family unity. *See Morel*, 90 F.3d at 841 ("Various provisions of the INA reflect Congress's intent to prevent the unwarranted separation of parents from their children."); *Lepe-Guitron*, 16 F.3d at 1025 (the INA gives "high priority to the relation between permanent resident parents and their children"); *see also* Thomas Alexander Aleinikoff, *et al.*, Immigration and Citizenship 326 (6th ed. 2008).

Several provisions of the INA highlight the statute's emphasis on prioritizing familial relations and providing favorable provisions for immediate family members. For instance, section 1254a(c)(2) allows immigration courts, in considering a grant of Temporary Protected Status (TPS), to waive certain excludability provisions for immigrants who have

helped their alien children enter the United States illegally. *See* 8 U.S.C. § 1182(a)(6).[16] To promote "family reunification," a waiver of excludability is provided for persons caught smuggling undocumented aliens if those undocumented persons are immediate relatives. 8 U.S.C. § 1182(a)(6)(E)(ii).[17]

Other provisions allow close family members to enter the country as a unit or provide opportunity for the family unit to re-constitute itself as quickly as possible. Thus, spouses and unmarried minor children of lawful permanent residents receive priority in visas for permanent resettlement in the United States. 8 U.S.C. §§ 1152, 1153. Children "applying for permanent residency status from outside the United States receive the same priority date and preference category as that of their parents." *Morel*, 90 F.3d at 841 (citing 8 C.F.R. 245.1(e)(2)(vi)(B)(1) (2009)). The asylum provisions similarly give priority to immediate family members:

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[16] *See* 136 Cong. Rec. H12358 (Oct. 27, 1990) ("[T]he conference report enhances the unification of families who have been separated by their own unfortunate circumstances and by our immigration laws. We have been faithful in returning family unification as the cornerstone of American immigration law and policy ... . American immigration law should be based upon a desire for pursuing the time-honored American tradition of encouraging family unity.").

[17] Additionally, section 1227(a)(1)(E)(iii) (former 8 U.S.C. § 1251(a)(1)(E)(iii)) allows the Attorney General to waive deportation of an alien who gained entry by fraud or misrepresentation if the alien is the "spouse, parent, son, or daughter" of a United States citizen or a lawful permanent resident. *See INS v. Yeuh-Shaio Yang*, 519 U.S. 26, 29 (1996).

the "spouse or child ... of an alien who is granted asylum ... may, if not otherwise eligible for asylum ..., be granted the same status as the alien if accompanying, or following to join, such alien." 8 U.S.C. § 1158(b)(3)(A). Importantly, the naturalization provisions, arguably the most stringent of the INA, illustrate Congress' intent to maintain family unity by allowing minor children in the legal and physical custody of their naturalized parents to become United States citizens automatically. 8 U.S.C. §§ 1431, 1433. These provisions exemplify strong and abiding congressional concern for the unification of parents with their children. *Lepe-Guitron*, 16 F.3d at 1025.

Congress has further provided protection for the family unity by enacting the Child Protection Status Act (CPSA), Pub. L. No. 107-208, 116 Stat. 927 (2002), codified at 8 U.S.C. § 1151(f). The CPSA allows a minor child's age to be "frozen" for the purpose of navigating the immigration process. 8 U.S.C. § 1151(f). Recognizing that the journey from admission to lawful permanent residence can take years because of the backlog of cases in the immigration courts, Congress mandated that a minor child will retain "child" status as of the date the child's parents file Form I-130 on the child's behalf. By creating this mechanism to protect the status of a minor child moving through the immigration process, Congress has provided further evidence of its intention to keep families together. The BIA's inflexible rule disallowing imputation of a parent's periods of residence and lawful permanent residence is inconsistent with this congressional purpose.

The Government acknowledges the immigration law's overall policy of maintaining family unity, but retorts that this preference cannot "trump Section 1229b(a)'s explicit requirement[s]." Petr. Br. 29. As already demonstrated, however, section 1229b(a) is silent as to whether imputation from a parent to his minor child is permitted. *Supra* at 20-28. Given the statutory silence, it is unreasonable for the agency to interpret section 1229b(a) in a way that runs counter to the cardinal policy of the INA. And although the policy of promoting family unity is not "absolute," Petr. Br. 30, the Government offers no reason to construe section 1229b(a) as contrary to that policy. The Government's examples demonstrate only that some immigration programs do not provide for an automatic derivative legal status for immediate family members. Petr. Br. 30-31. But the imputation rule does not vest minors with any automatic status, irrespective of whether they had already obtained such status on their own. Rather, as a matter of equity, it refuses to penalize them for a delay in obtaining that status when that delay is not attributable to the minors.

Consonant with the statutory objective of promoting family unity, courts have accorded a liberal treatment for children within the context of the immigration system. *See, e.g., Solis-Espinoza v. Gonzales*, 401 F.3d 1090, 1094 (9th Cir. 2005) (the INA "was intended to keep families together" and therefore "[i]t should be construed in favor of family units and the acceptance of responsibility by family members"); *Amezquita-Soto v. INS*, 708 F.2d 898, 903 (3d. Cir. 1983) ("the separation of family members from one another [is] a serious matter requiring close and careful scrutiny") (citation omitted); *Perales v.*

Casillas, 903 F.2d 1043, 1046 (5th Cir. 1990) ("one of the central purposes of the immigration laws [is] family reunification"); *Lau v. Kiley*, 563 F.2d 543, 545 (2d Cir. 1977) (the INA's preference system was "primarily designed to further the basic objective of reuniting families"); *Dallo v. INS*, 765 F.2d 581, 587 n.7 (6th Cir. 1985) (Congress has promoted the goal of family unification through many provisions in the INA); *Fornalik v. Perryman*, 223 F.3d 523, 525-26 (7th Cir. 2000) (lamenting that the "basic principle" of family unification is sometime overwhelmed by complexities of immigration laws).

Moreover, the BIA itself has long acknowledged this policy of promoting family unity. Thus, in *In re C-V-T-*, 22 I. & N. Dec. 7, 11 (B.I.A. 1998), the BIA explained that an IJ considering cancellation of removal should give considerable weight to "such factors as family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred at a young age), [and] evidence of hardship to the respondent and his family if deportation occurs."

CIS — the DHS component agency that administers immigration benefits — similarly acknowledges the prioritization of family unity when providing guidance regarding the process of applying for lawful permanent residence: "To promote family unity, immigration laws allow permanent residents of the Unites States (green card holders) to petition for certain eligible relatives to come live permanently in the United States." U.S. Citizenship and Immigration Services, "Green Card for a Family Member of a Permanent Resident" (2011), http://www.uscis.gov/portal/site/uscis (follow "Green

Card Through Family" hyperlink; then follow "a family member of a green card holder" hyperlink). These eligible relatives include the resident's spouse and unmarried children under the age of 21. *Id.* The CIS's guidance further points out that "[i]mmediate relatives [of United States citizens] have special immigration priority and do not have to wait in line for a visa number to become available to them to immigrate because there are an unlimited number of visas for their particular categories." U.S. Citizenship and Immigration Services, "Green Card for an Immediate Relative of a U.S. Citizen" (2011), http://www.uscis.gov/portal/site/uscis (follow "Green Card Through Family" hyperlink; then follow "an immediate relative of a U.S. citizen" hyperlink). Children of lawful permanent residents also receive higher priority for immigrant visa, being placed into a "family preference category," which allows them to receive available visas before other types of applicants. U.S. Citizenship and Immigration Services, "Green Card for a Family Member of a Permanent Resident."

Imputation of the parents' actions and status to their minor children supports the basic understanding embraced by the immigration agencies that parents must make decisions regarding immigration on behalf of their minor children. The immigration agencies' practice further illustrates the priority that the INA places on the family and demonstrates that imputation of parental status and residency promotes this goal.

D. The Court of Appeals' Rule Is Consistent with the Use of Imputation as an Equitable Doctrine.

Imputation of the durational requirements of section 1229b(a) is only one of numerous immigration contexts where both courts and the BIA impute parental state of mind, intent, and status to the parents' unemancipated minor children. Courts have "allowed imputation precisely because the minor either was legally incapable of satisfying one of these criteria or could not reasonably be expected to satisfy it independent of his parents." *Barrios v. Holder*, 581 F.3d 849, 862 (9th Cir. 2009). By using imputation in these ways, courts and the BIA further the congressional goal of promoting family unity in the immigration context and interpret the INA consistently with that goal.

In the asylum context, courts hold that a minor child's status must be assumed to be the same as that of the parents. *See Vang v. INS*, 146 F.3d 1114, 1116 (9th Cir. 1998) (applying 8 C.F.R. § 207.1(c) to make a determination of whether a minor "has firmly resettled in another country"). As the court in *Vang* noted, "it would be unreasonable to hold an adolescent responsible for arranging or failing to arrange permanent resettlement," precisely because it is a parent's duty to do so. *Id.* at 1116 (quotation marks and citation omitted).

The BIA imputes parental state of mind to minors in other contexts where a child is deemed incapable of establishing his own status or state of mind. The BIA imputes parental knowledge of inadmissibility to a minor child for the purposes of determining whether

the child would qualify for a waiver of removal under 8 U.S.C. § 1182(k) — a provision that permits a waiver if the alien did not know or could not have known of facts establishing his inadmissibility. *See Mushtaq v. Holder*, 583 F.3d 875, 878 (5th Cir. 2009) (upholding a BIA decision to impute the parent's knowledge of inadmissibility to the child); *Senica v. INS*, 16 F.3d 1013, 1014 (9th Cir. 1994) (same).

In addition, the BIA imputes a parent's abandonment of lawful permanent residence to his minor children. The BIA has maintained that a minor child has "abandoned [his] status as a permanent resident when [his] parents abandoned their status while [he was] still a minor in their care and custody." *Shyiak v. Bureau of Citizenship & Immigration Servs.*, 579 F. Supp. 2d 900, 903 (W.D. Mich. 2008) (quoting a CIS decision holding an alien ineligible for naturalization after imputing to the alien his parents' abandonment of their lawful permanent status); *see also In re Zamora*, 17 I. & N. Dec. 395, 396 (B.I.A. 1980) (imputing parents' abandonment of lawful permanent residence to minor child); *In re Winkens*, 15 I. & N. Dec. 451, 452 (B.I.A. 1975) (same).[18] Recognizing the purpose behind such

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[18] The Government seeks to distinguish these cases on the basis that they implicate "state of mind, not objective conditions such as 'status' or 'residence.'" Petr. Br. 38. But, as already demonstrated, the determination of a continuous or permanent residence under the immigration law cannot be divorced entirely from the question of whether the alien made an intentional decision to establish a residence in a particular place, or to choose a particular country as his permanent residence. *Supra* at 37-39 & n.12. Unlike adults, the minors are incapable of taking such actions or making such a choice on their own. Therefore, looking towards the actions and choices made by

(continued...)

imputation, circuit courts have affirmed these decisions of the BIA. *See Usmani v. Att'y Gen.*, 341 Fed. App'x 473, 476 (11th Cir. 2009) (unpublished) (upholding the BIA's order of removal based on imputation to the minor alien of his parents' intent to abandon lawful permanent resident status); *Nikoi v. Att'y Gen.*, 939 F.2d 1065, 1070-71 (D.C. Cir. 1991) (upholding the BIA's practice of imputing parents' abandonment of lawful permanent residence to the U.S.-born children of foreign diplomats in denying naturalization).

The BIA's widespread reliance on imputation in the immigration context lessens considerably the degree of deference its rejection of imputation under section 1229b(a) should receive. *See Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) (conflicting agency interpretations are entitled to significantly less deference than consistently applied interpretations). It is inconsistent to permit imputation of a parent's status in certain cases, including some cases where imputation harms the child and makes immigration more difficult, but refuse to impute lawful permanent resident status or admission status for 8 U.S.C. § 1229b(a).

The court of appeals was thus correct to endorse imputation and to refuse to defer to the BIA's position, especially given that deportation or removal is a "drastic measure" and "a particularly severe penalty." *Padilla v. Kentucky*, 130 S. Ct. 1473, 1478, 1481 (2010) (internal quotation marks and citation

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(...continued)

their parents is entirely reasonable and consonant with the statutory purposes.

omitted). The BIA's interpretation is therefore unreasonable and not entitled to *Chevron* deference.

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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RESPONDENT'S BRIEF

RECORD AND BRIEFS

No. 10-1543

In the Supreme Court of the United States

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
Petitioner,

v.

DAMIEN ANTONIO SAWYERS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Whether a parent's years of residence after lawful admission to the United States may be imputed to an unemancipated minor child for purposes of satisfying the requirement of 8 U.S.C. § 1229b(a)(2) that aliens seeking discretionary cancellation of removal have "resided in the United States continuously for 7 years after having been admitted in any status."

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BRIEF FOR RESPONDENT

STATEMENT

To be eligible for relief from removal under 8 U.S.C. § 1229b(a)(2), respondent Damien Antonio Sawyers must establish that he has "resided in the United States continuously" for seven years. Respondent's mother, now a U.S. citizen, did reside continuously in this country for more than seven years while respondent was a minor child, and he lived with her for at least a portion of that period. The question here is whether the years of continuous U.S. residence accumulated by respondent's mother may be imputed to him for purposes of satisfying the "resided continuously" requirement of Section 1229b-(a)(2).

In its answer to this question, the government's brief reveals significant areas of common ground between the parties. The government evidently recognizes that the courts uniformly had permitted parent-to-child imputation under Section 1229b(a)(2)'s predecessor provision, Section 212(c) of the Immigration and Nationality Act of 1952 (INA), Pub. L. 82-414, 66 Stat. 163. See U.S. Br. 27. It acknowledges that Congress changed the language of this relief-from-removal provision when it enacted Section 1229b(a)(2) for reasons that had nothing to do with imputation, and does not suggest any reason why Congress would have *wanted* to preclude imputation when it made this change. It also recognizes that precluding imputation leads to an outcome that is in some tension with Congress's goal of encouraging family unification. See U.S. Br. 25-26, 29-30. But the government nevertheless insists that when Congress replaced the "unrelinquished domicile" requirement

of Section 212(c) with Section 1229b(a)(2), it left "no textual hook whatever for imputation." U.S. Br. 28.

That conclusion, however, is wrong. Courts permitted imputation of "unrelinquished domicile" from parent to child under Section 212(c) in part because domicile has an intent component and it is appropriate to impute a parent's intent to a minor child. But in this respect, the language of Section 1229b(a)(2) is identical to that of Section 212(c); in the immigration context, the term "resided continuously" (or "continuously resided") *also* always has been understood to look to intent. Moreover, courts applying Section 212(c) necessarily imputed residence from parent to child because residence is an essential element of domicile. Congress accordingly would have known that the language of Section 1229b(a)(2) did not depart from that of its predecessor in any material way—and that this language continued to permit imputation.

A. Statutory Background

1. The current cancellation-of-removal provision codified at 8 U.S.C. § 1229b is rooted in a long history of earlier immigration provisions. Section 3 of the Immigration Act of 1917 excluded from admission to the United States several classes of aliens, such as those that had committed crimes of moral turpitude. Immigration Act of 1917, Pub. L. 64-301, 39 Stat. 875-876. The Seventh Proviso in Section 3 of the Act contained an early version of a waiver of excludability. *Id.* at 878. In 1952, when Congress enacted the current INA, it included a waiver of excludability in

the former Section 212(c) of the Act. 8 U.S.C. § 1182(c) (1994).[1] Prior to 1996, this section provided:

> Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) of this section (other than paragraphs (3) and (9)(c)).

8 U.S.C. § 1182(c) (1994); *Judulang* v. *Holder*, No. 10-694, slip op. 2-3 (U.S. Dec. 12, 2011) (describing Section 212(c)).[2] In the years prior to 1996, the agency awarded relief under former Section 212(c) in approximately half of all cases in which it was sought. See *INS* v. *St. Cyr*, 533 U.S. 289, 296 n.5 (2001).

Prior to the passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, div. C, 110 Stat. 3009-546, all of the courts of appeals that had addressed the issue uniformly agreed that a parent's lawful unrelinquished domicile could be imputed to an unemancipated minor for the purpose of satisfying the eligibil-

---

[1] This provision is generally referred to as Section 212(c), its place in the INA. In this brief, we refer to the current version of the cancellation-of-removal provision by its place in Title 8 of the United States Code.

[2] The Board of Immigration Appeals (BIA) and courts interpreted this provision to apply to aliens in deportation as well as exclusion proceedings, so long as the inadmissible or deportable alien was a lawful permanent resident and had accrued seven years of lawful unrelinquished domicile in the United States. See *Judulang*, slip op. 2-4.

ity requirements for a Section 212(c) waiver. *Morel* v. *INS*, 90 F.3d 833, 840-841 (3d Cir. 1996), *vacated on other grounds*, 144 F.3d 248 (3d Cir. 1998); *Lepe-Guitron* v. *INS*, 16 F.3d 1021, 1022 (9th Cir. 1994); *Rosario* v. *INS*, 962 F.2d 220, 224 (2d Cir. 1992). This settled judicial construction of former Section 212(c) allowing imputation was based in part on the courts' view that children lacked the legal capacity to form their own domicile. See, *e.g.*, *Rosario*, 962 F.2d at 224 (noting that under the common law understanding of domicile, "[a] minor's domicile is the same as that of its parents, since most children are presumed not legally capable of forming the requisite intent to establish their own domicile") (citing *Miss. Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 48 (1989)).

The courts recognized "Section 212(c) was enacted to provide relief from deportation for those who have lawfully formed strong ties to the United States," and "[b]ecause children naturally form the strongest of ties to the place where their parents are domiciled and they with them, section 212(c)'s core policy concerns would be directly frustrated by the government's proposal to ignore the parent's domicile in determining that of the child." *Lepe-Guitron*, 16 F.3d at 1025; see also *Morel*, 90 F.3d at 841 (same); *Rosario*, 962 F.2d at 224 (explaining that "[t]his connection with the parent—and, by extension, with this country—evinces the type of bond that the statute was designed to protect from unwarranted severance").

2. In 1996, Congress enacted IIRIRA, replacing former Section 212(c) with a new "cancellation of removal" provision codified at 8 U.S.C. § 1229b(a). See 110 Stat. 3009-597; *Judulang*, slip op. 4. This provi-

sion sets out the eligibility criteria for cancellation of removal for specified aliens as follows:

> (a) Cancellation of removal for certain permanent residents
>
> The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien–
>
> (1) has been an alien lawfully admitted for permanent residence for not less than 5 years,
>
> (2) has resided in the United States continuously for 7 years after having been admitted in any status, and
>
> (3) has not been convicted of any aggravated felony.

8 U.S.C. § 1229b(a).

It appears that Congress replaced Section 212(c) with Section 1229b(a) to "clarify an area of the law regarding the cutoff periods for these benefits that have given rise to significant litigation and different rules being applied in different judicial circuits." 141 Cong. Rec. S6082-04, S6104 (1995).[3] In particular, the courts of appeals at the time were divided on when an alien began accruing the years of domicile

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[3] This explanation for the provision was offered by the Justice Department in connection with a predecessor bill to IIRIRA, the Immigration Enforcement Improvements Act, S. 754, 104th Cong. (1995). See 141 Cong. Rec. S6082-04, S6092 (May 3, 1995). The statement in text is taken from the Department's section-by-section commentary on the unenacted bill, which contained a version of the cancellation of removal provision virtually identical to the provision codified at 8 U.S.C. § 1229b(a).

required to qualify for relief. Three circuits had held that an alien could begin accruing years of domicile *prior* to acquiring LPR status;[4] the Board of Immigration Appeals (BIA) and two other circuits, in contrast, had concluded that an alien began accruing years of domicile only *after* the alien acquired lawful permanent resident (LPR) status.[5]

Congress resolved this disagreement through the enactment of Section 1229b(a), requiring five years as a lawful permanent resident and seven years in any status after lawful admission as a prerequisite for relief; the latter provision allows aliens to begin accruing years of residence after entering the United States on a non-permanent visa, such as a student visa. The legislative history of IIRIRA does not contain any indication that Congress considered the then-settled imputation rule during the passage of the bill.

At the time that Congress enacted IIRIRA, some of the terms used in Section 1229b already were defined in the INA. Thus, the INA defines the phrase "lawfully admitted for permanent residence" as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigrant laws,

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[4] See *White* v. *INS*, 75 F.3d 213, 216 (5th Cir. 1996); *Castellon-Contreras* v. *INS*, 45 F.3d 149, 152-154 (7th Cir. 1995); *Lok* v. *INS*, 548 F.2d 37, 40 (2d Cir. 1977).

[5] See *Michelson* v. *INS*, 897 F.2d 465, 469 (10th Cir. 1990); *Chiravacharadhikul* v. *INS*, 645 F.2d 248, 249 (4th Cir. 1981); *In re S.*, 5 I. & N. Dec. 116, 117-118 (B.I.A. 1953). The Ninth Circuit initially agreed with the BIA and the Fourth and Tenth Circuits (see *Castillo-Felix* v. *INS*, 601 F.2d 459, 467 (9th Cir. 1979)), but later changed its position. See *Ortega de Robles* v. *INS*, 58 F.3d 1355, 1360-1361 (9th Cir. 1995).

such status not having changed." 8 U.S.C. § 1101-(a)(20). "Residence" is defined in the INA as being the alien's "place of general abode; the place of general abode means his principal, actual dwelling place in fact, without regard to intent." 8 U.S.C. § 1101-(a)(33). And the INA defines the word "admitted" as "the lawful entry of the alien into the United States after inspection and authorization by an immigration officer." 8 U.S.C. § 1101(a)(13)(A). An alien may be admitted into the United States by entering at a port of entry or by applying for adjustment of status under the INA while already in the country. See *In re Alyazji*, 25 I. & N. Dec. 397, 399 (B.I.A. 2011) (noting that "the Board has often held that adjustment of status is an 'admission'").

B. Proceedings Below

In October 1995, at the age of fifteen, respondent became a lawful permanent resident. Pet. App. 10a. His mother, however, had become a lawful permanent resident in 1989, when respondent was nine years old. Resp. Opening Br. 3 & n.2, *In re Damien Antonio Sawyers*, A44-852-478 (B.I.A. 2007), *available at* Admin. Rec. 8. The government states that the record does not indicate whether Sawyers had been present in the United States prior to his admission as an LPR in 1995. U.S. Br. 9.

On August 9, 2002, respondent was convicted in Delaware state court of "maintaining a dwelling for keeping controlled substances." J.A. 30-44; Pet. App. 11a. The government subsequently began removal proceedings against him by filing a Notice to Appear charging (as amended) that he is subject to removal under 8 U.S.C. § 1227(a)(2)(B)(i) as an alien convicted of a controlled-substance offense. Pet. App. 10a-11a. Respondent denied removability and, in the

alternative, sought cancellation of removal. J.A. 16-29, 49-55; Pet. App. 11a-13a. He contended that he satisfied the second prong of the Section 1229b(a) test for eligibility for cancellation because the period of his mother's lawful permanent residence in the United States could be imputed to him.[6]

In September 2007, after a hearing, the Immigration Judge (IJ) found respondent removable and further found that he was ineligible for cancellation of removal because his conviction in August 2002, when he had been a lawful permanent resident for just under seven years, cut off his period of residence for purposes of becoming eligible for relief from removal under Section 1229b(a)(2). Pet. App. 9a-14a. The IJ did not, however, expressly discuss whether respondent could impute his mother's period of lawful residence for the purpose of fulfilling Section 1229b(a)(2)'s seven-year continuous-residence requirement.

The BIA affirmed, specifically declining respondent's request for imputation. Pet. App. 7a. The BIA acknowledged the Ninth Circuit's decision in *Cuevas-Gaspar* v. *Gonzalez*, 430 F.3d 1013 (9th Cir. 2005), which had authorized imputation of a parent's period of continuous residence after lawful admission for the purpose of satisfying Section 1229b(a)(2)'s seven-year continuous-residence requirement. Pet. App. 7a.

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[6] At the time of his hearing, respondent had been an "alien lawfully admitted for permanent residence" for more than five years and therefore satisfied the first prong of the Section 1229b(a) test for eligibility. 8 U.S.C. § 1229b(a)(1). Additionally, the government concedes that respondent satisfies the third prong of the eligibility test. 8 U.S.C. § 1229b(a)(3) (the alien must not have been "convicted of any aggravated felony").

The BIA explained, however, that it had disagreed with the Ninth Circuit in a subsequent published decision (*In re Escobar*, 24 I. & N. Dec. 231 (B.I.A. 2007)), and followed that holding instead of the Ninth Circuit's ruling in *Cuevas-Gaspar*. Pet. App. 7a.

The Ninth Circuit reversed. Pet. App. 1a-2a. The court applied the rule of *Mercado-Zazueta* v. *Holder*, 580 F.3d 1102 (9th Cir. 2009), in which it had rejected the BIA's decision in *In re Escobar*. Pet. App. 2a. The court concluded that, in light of *Mercado-Zazueta*, the BIA "must impute to [respondent] his mother's residency for purposes of cancellation of removal." Pet. App. 2a. The court remanded "on an open record for any further determinations that the BIA deems necessary," including findings "regarding the residency of [respondent's] mother and regarding whether [respondent] was a minor residing with her." Pet. App. 2a. The Ninth Circuit subsequently denied the government's petition for rehearing en banc without dissent. Pet. App. 3a.

INTRODUCTION AND SUMMARY OF ARGUMENT

The government's brief is striking in its almost complete failure to offer an affirmative case for its position. It concedes that the imputation rule was settled prior to the enactment of Section 1229b(a)(2). U.S. Br. 27 (noting "the preexisting interpretation permitting imputation"). It does not suggest that Congress actually sought to abandon the imputation rule when it enacted the provision, or, indeed, thought about imputation at all. U.S. Br. 26, 27. It does not offer any reason of policy why Congress *would* have wanted to abandon the imputation rule, or to change the relief-from-removal provision in a

way that would advantage adults while harming children. And it appears to agree that immigration policy generally favors rules that encourage family unification. U.S. Br. 29 (noting "[t]he general preference for family unity"). Almost the entirety of its brief therefore is devoted to arguing (unsuccessfully, as we will explain) why these considerations do not compel recognition of an imputation requirement. Even the government's appeal to agency deference is defensive, arguing not why the agency is right or reasonable, but why its position is not inconsistent with its past pronouncements or with the federal immigration policy favoring family unification.

Against this background, the government really offers only two defenses of the BIA's approach. The first is that Section 1229b(a)(2)'s reference to "the alien" necessarily precludes imputation; but that reading of the statute is obviously wrong, having been rejected even by those courts that ultimately deferred to the agency on the imputation question. The second is that Congress's substitution of the term "resided continuously" for "domicile" in Section 1229b(a)(2) eliminated consideration of intent from the statutory test and thus (perhaps inadvertently) precluded imputation. But that, too, is incorrect: The term "resided continuously" has always been understood to require an inquiry into intent, and the BIA has itself long imputed residence in a range of contexts.

Congress accordingly would have understood the language it chose to provide for imputation; it would have had no reason to eliminate imputation, even as it liberalized the relief-from-removal rule in other respects; and it would have seen imputation as wholly consistent with broader immigration policy. By focus-

ing only on the statutory definition of "residence," while ignoring the well-established meaning of "resided continuously," the government disregards these compelling considerations.

A. Relying on the statute's use of a "definite article" in referring to "*the* alien," the government contends that the plain language of Section 1229b(a)(2) precludes imputation. But the courts of appeals have uniformly rejected this argument, for good reason: It assumes its conclusion. The question is what years of continuous residence are attributable to "the alien" seeking relief. If more than seven years that the applicant's parent spent residing in the United States are imputable to the applicant, "the alien" seeking relief has, as a legal matter "resided in the United States continuously" for the relevant period. Section 1229b(a)(2) does not differ in this respect from other provisions of the immigration law in which the BIA has recognized imputation as permissible or, for that matter, from Section 212(c) itself.

B. Congress plainly did not intend to displace the imputation rule. That rule had been embraced by every court to consider it prior to the enactment of IIRIRA. The government agrees that Congress did not change the language of Section 212(c) *for the purpose* of displacing the rule, and does not suggest that Congress had expressed dissatisfaction with imputation in any respect. And the government offers no reason why Congress would have wanted to bar imputation. In fact, there is every reason to believe Congress had no such intent: Elimination of imputation would be inconsistent with Congress's use of language that liberalized the rules governing the availability of relief from removal in significant respects; would run counter to Congress's broader im-

migration goal of favoring family unity; and would suggest, perversely, that Congress intended to favor adults while disadvantaging children.

C. The government contends that the change in language from "unrelinquished domicile" to "resided continuously" necessarily precludes imputation because (1) courts impute intent from parent to child and (2) domicile, but not residence, "turns on intent." U.S. Br. 28. The government is wrong, in two respects.

For one, "resided continuously" is a term of art in immigration law that has always required consideration of intent. Long before the enactment of IIRIRA, the BIA had taken the position that determination of "continuous residence" required looking to whether the applicant had an "intent to abandon residence in the United States." *In re A.*, 4 I. & N. Dec. 723, 725 (B.I.A. 1952). And in the context of another provision of the INA, the BIA had said that a child's "*residence* is imputed [from] his parents while a minor" (*In re Ng*, 12 I. & N. Dec. 411, 412 (B.I.A. 1967) (emphasis added))—notwithstanding the presence in the INA of 8 U.S.C. §1101(a)(33), which defines "residence" (but not *"continuous* residence") without regard to intent.

That is unsurprising; the element of intent comes into play when determining whether the residence was *continuous*. In other words, even if "residence" or "residing" does not have a mental-state component, "continuously" does. This Court likewise equated unrelinquished domicile with continuous residence. Congress is presumed to have been aware of this background when it drafted Section 1229b(a)(2), and thus would have thought the lan-

guage of that provision to be wholly consistent with imputation.

In addition, residence, even regarded as a "principal, actual dwelling place in fact," has consistently been imputed from parent to child as an element of the imputation of domicile. Residence must be established for domicile to be present; a person domiciled in a particular place *must* also be resident there. As a consequence, the pre-IIRIRA courts that imputed domicile under Section 212(c) necessarily were imputing not only the parent's intent to remain in the United States permanently, but also the parent's residence in the United States. For this reason as well, Congress would have expected its choice of the term "resided continuously" to continue to permit imputation under Section 1229b(a)(2).

D. The government cannot escape this conclusion by invoking principles of agency deference. Viewed in context, the statute is not ambiguous at all. Congress chose language for Section 1229b(a)(2) that it would have understood to permit imputation; it makes no sense to believe that Congress implicitly eliminated parent-child imputation even while liberalizing the relief-from-removal provision in other respects; and the government's reading runs counter both to the broader policy of immigration law and to the principle that requires construction of ambiguous language in the alien's favor. But even if there were uncertainty here, the BIA's approach would not be entitled to deference. The Board has been wildly inconsistent in its treatment of imputation, allowing it in circumstances similar to those here when it harms, but not when it aids, the alien. This is the paradigm of arbitrary agency action.

ARGUMENT

I. SECTION 1229b(a)(2) DOES NOT ALTER THE SETTLED IMPUTATION RULE APPLIED TO CANCELLATION OF REMOVAL PRIOR TO IIRIRA.

A. The Text Of Section 1229b(a) Furnishes No Support For The Government's Rejection Of The Well-Settled Imputation Rule.

At the outset, the government places considerable emphasis on the plain language of Section 1229b(a)(2). U.S. Br. 15-23. But the text of Section 1229b(a)(2) contains no indication that Congress intended to reject a rule that was uniformly accepted prior to IIRIRA. The language of Section 1229b(a)(2) reads much like that of Section 212(c) or any other provision where imputation applies; it contains no explicit language that either endorses or rejects the rule, but the context plainly implies the possibility of imputation. The government's contrary reading advocates a position that would read imputation out of the INA entirely, a position neither it nor the BIA endorses.

Notably, the courts that the government contends agree with its approach have *not* adopted the textual arguments the government offers here. To the contrary, the Third Circuit declared that "[t]he INA * * * does not expressly address the question whether parents' years of residence may be imputed to their minor children * * *. The cancellation of removal provision neither provides for such imputation nor disallows it." *Augustin* v. *Att'y Gen.*, 520 F.3d 264, 269 (3d Cir. 2008) (quoting *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843

(1984)). Thus, neither the Third nor the Fifth Circuit based its holding for the government on the statutory language. See *id.* at 267-271; *Deus* v. *Holder*, 591 F.3d 807, 811 (5th Cir. 2009).

The courts rejected the government's linguistic argument for good reason. The government misstates the imputation rule, which does not imply that a parent is fulfilling the statutory criteria *on behalf* of his or her child; instead, "the alien" is fulfilling the requirements *him- or herself*, after the child's parents' years of domicile have been imputed. The government's argument therefore presupposes its conclusion: Only by rejecting the imputation rule in the first place can one argue that "the alien" is unable to fulfill the requirements of 1229b(a). If imputation of residence *is* permissible for a minor child, "*the* alien" necessarily will be deemed to have satisfied the seven-year residency requirement. For the same reason, the government's focus on the statutory phrase "after having been admitted" fails. U.S. Br. 17.[7]

In fact, the imputation rule is used elsewhere in the INA in just the way described above. Nowhere is the rule explicitly mentioned in the text of the statute—and there are other contexts where it has been held to apply despite the use of limiting articles such

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[7] The government also misunderstands the imputation rule when it conflates years of continuous residence, which is imputable, with date of admission, which is not. See U.S. Br. at 21-23. There is nothing inherently problematic about utilizing aliens' actual date of admission for the purposes of one provision, while imputing years of their parents' residence for another. Indeed, this is the natural consequence of *any* imputation rule. The government's claims that imputation would lead to "incongruous results" and would "nullify" the operation of other provisions are exaggerated and unexplained assertions.

as "the" or "an." See, *e.g.*, *Senica* v. *INS*, 16 F.3d 1013, 1016 (9th Cir. 1994) (imputing a mother's knowledge of her children's excludability even though the provision at issue (8 U.S.C. § 1182(k) (1988)) provided that the grounds for exclusion must be known to "*the* immigrant" (emphasis added));[8] see also *Vang* v. *INS*, 146 F.3d 1114, 1116 (9th Cir. 1998) (imputing a parent's resettlement status to a child for the purpose of applying an immigration regulation denying asylum to "an alien" who has "resettled" in another country).

Most notably, the government's textual argument applies equally to Section 212(c) itself, which says nothing of imputation but which the government acknowledges was understood to permit it.[9] Hence there is no merit to the government's assertion that Section 1229b(a) "leaves no room" for imputation (U.S. Br. 16); it leaves the same "room" as did Section 212(c).

Imputation is a pervasive and well-settled principle of immigration law, as we explain below in some detail, and Congress need not refer to it directly in contexts where it is understood to apply. *Alber-*

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[8] The statute in *Senica* stated in relevant part that "any alien" may be admitted in the Attorney General's discretion if the grounds for inadmissibility were not known to "*the* immigrant," including "in the case of an immigrant coming from foreign contiguous territory, before the time of the immigrant's application for admission." 16 F.3d at 1014 n.2 (emphasis added).

[9] Section 212(c) referred to "aliens" rather than "the alien," but this distinction is irrelevant. "In determining the meaning of any Act of Congress, unless the context indicates otherwise—words importing the singular include and apply to several persons, parties, or things; words importing the plural include the singular * * *." 1 U.S.C. § 1.

naz v. *United States*, 450 U.S. 333, 341 (1981) ("Congress cannot be expected to specifically address each issue of statutory construction which may arise."). Our point is not, as a general matter, that "the lack of an express bar cannot be read as affirmatively authorizing imputation" (U.S. Br. 20); it is the less ambitious one that the language Congress used in Section 1229b cannot plausibly be read to settle the matter in the government's favor.

B. Congress Did Not Intend To Alter The Imputation Rule When It Replaced The Phrase "Unrelinquished Domicile" With "Resided Continuously."

The plain language of Section 1229b thus does not answer the question in this case. But the statutory context does: Congress plainly did not mean to disturb the settled imputation rule.

1. Congress Did Not Alter The Statutory Text For The Purpose Of Altering The Imputation Rule.

As an initial matter, the government does not deny that the imputation rule *was* settled prior to the enactment of IIRIRA. And it nowhere argues that Congress altered the statutory language *for the purpose of* foreclosing the imputation rule. To the contrary, the government agrees with us that Section 212(c) was amended for an entirely different reason: to resolve the disagreement among the circuits as to "whether * * * seven years must follow the granting of LPR status to the alien or whether the alien could count years of domicile in the United States under some other lawful status preceding his adjustment to LPR status." U.S. Br. 25.

Within this context, the change from "unrelinquished domicile" in Section 212(c) to "resided continuously" in Section 1229b(a)(2) was a logical textual alteration specifically tailored for a particular purpose. Before IIRIRA, the BIA had held that aliens could accrue years of lawful unrelinquished domicile only when they had lawful permanent resident status. This is because "domicile" was understood to involve the lawful intent to make the United States one's home. The BIA reasoned that, unless an alien had LPR status, he or she could not *lawfully* intend to remain; any intent to remain indefinitely would contravene the terms of the alien's non-immigrant visa. See *In re S.*, 5 I. & N. Dec. 116, 117-118 (B.I.A. 1953).

Continuous residence, in contrast, could be accrued in any status.[10] As explored in further detail below, "unrelinquished domicile" and "resided conti-

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[10] This distinction between the terms is brought into sharp relief in court decisions pre-IIRIRA where INA Section 212(c) (unrelinquished domicile) intersected with 8 U.S.C. § 1255a (which requires continuous residence). For example, Section 1255a requires that an alien "continuously resided in the United States" as a temporary resident until he or she applies for LPR status. 8 U.S.C. § 1255a(b)(1)(B)(i); see also 8 U.S.C. § 1255a(b)(3)(A) (during temporary residence, "the Attorney General shall * * * permit the alien to return to the United States after such brief and casual trips abroad *as reflect an intention* on the part of the alien to adjust to lawful permanent resident status" (emphasis added)). The Seventh Circuit allowed the alien to count years spent residing continuously in lawful temporary status, under Section 1255a, toward years of lawful "unrelinquished domicile" under INA Section 212(c). See *Castellon-Contreras* v. *INS*, 45 F.3d 149, 154 (7th Cir. 1995); see also *infra* pp. 30-31 (discussing Section 1255's intent-based "continuous residence" requirement).

nuously" are concepts that have been treated very similarly in immigration law over the past sixty years. See, *e.g.*, *INS* v. *Phinpathya*, 464 U.S. 183, 191 (1984). The principal difference between the two concepts is that, while continuous residence does require the intent to *presently* remain, it does not require the intent to make the United States one's home *permanently*. It therefore is possible to reside in the United States continuously without having LPR status. As a consequence, the term "resided continuously" was an ideal one for Congress to use in Section 1229b(a)(2): The term imports most of the connotations of unrelinquished domicile (including an intent component), but avoids the ambiguity regarding the immigration status a resident must have.

As one commentator noted immediately after the amendment's passage, "IIRIRA *solves the problem of domicile* by requiring the alien's continuous residence for seven years after the alien has been admitted in any status." Elwin Griffith, *The Road Between the Section 212(c) Waiver and Cancellation of Removal Under Section 240a of the Immigration and Nationality Act—The Impact of the 1996 Reform Legislation*, 12 Geo. Immigr. L.J. 65, 116 (1997) (emphasis added). This understanding of IIRIRA's purpose fully explains why Congress changed the phrase "unrelinquished domicile" to "resided continuously." The government accepts this explanation, and points to no evidence that Congress had any other motive when removing the word "domicile" from the statute. Congress did not alter the relevant statutory language in order to foreclose the imputation rule.

2. *Congress Cannot Have Intended To Remove The Imputation Rule Because Such A Desire Would Be Inconsistent With The Effect Of Section 1229b And With The INA As A Whole.*

Indeed, far from acting *to* eliminate imputation, such an outcome would be inconsistent with the broader congressional purpose. The change from Section 212(c) to Section 1229b(a) generally liberalized the showing of presence in the United States that must be made to qualify for relief from removal. Thus, aliens now are allowed to count two years prior to their accrual of LPR status toward the seven-year residence requirement; under the BIA's prior interpretation of Section 212(c), aliens had to be domiciled in the United States for seven years *after* they became legal permanent residents to be eligible for cancellation of removal. In addition, for reasons we have just explained, it is easier to demonstrate continuous residence than domicile because the latter requires a showing of an intent to reside in the United States *permanently*, while the former does not.

The change from Section 212(c) to 1229b(a) therefore makes it more likely that aliens will successfully petition for cancellation, and likely leads to more aliens being able to remain in the United States. See Griffith, *supra*, at 116. ("It stands to reason, therefore, that this change in statutory language should benefit the alien by removing any doubts about the alien's status preceding his admission as a permanent resident.").[11] In this context, it is im-

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[11] This is not to say that Section 1229b as a whole necessarily will lead to more aliens being allowed to remain in the United States, as it contains other new restrictions, including a bar on

plausible to suggest that Congress, in changing the phrase "unrelinquished domicile" to "resided continuously," had the intention of helping adult immigrants by liberalizing the eligibility requirements for relief even while radically reducing the availability of relief for immigrant children by eliminating the imputation rule.[12]

Any such intent is made especially improbable by the favorable treatment of children evidenced elsewhere in the INA. The legislative history of the INA demonstrates this general intent to favor children. See H.R. Rep. No. 85-1199, at 6 (1957) ("The legislative history of the Immigration and Nationality Act clearly indicates that the Congress intended to provide for a liberal treatment of children * * *.").

Similarly, the INA shows a clear preference for family unity, as we also explain below in more detail and as the government acknowledges. U.S. Br. 29. To be sure, the government devotes much space to explaining that this preference does not "trump" the

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relief for aliens who have committed certain crimes and a stop-time provision. U.S. Br. 24. But with respect to the critical change in statutory language that the government relies on here (from "unrelinquished domicile" to "resided continuously"), it is undeniable that the purpose of Congress in amending the statute was to benefit immigrants who had lived in the United States for at least seven years but not for seven years with LPR status.

[12] In fact, Congress took steps to avoid enacting provisions in IIRIRA that had punitive effects on immigrant children. Thus, when signing IIRIRA into law, President Clinton noted that the law "does not include the so-called Gallegly amendment, which * * * would have allowed States to refuse to educate the children of illegal immigrants." Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, 1996 U.S.C.C.A.N. 3388, 3391 (1996) (signing statement of Pres. Clinton).

plain language of the statutory text. U.S. Br. 29-33. This is certainly correct, but it is not responsive to our point—which is that consistent congressional policy surely is a relevant consideration in trying to discern Congress's intent in altering statutory language. Absent a clear indication in the text or history of Section 1229b(a)(2), the Court should not understand Congress to have enacted that provision to achieve an end that is inconsistent with the language and structure of the rest of the INA. *United States* v. *Atl. Research Corp.*, 551 U.S. 128, 135 (2007) ("Statutes must 'be read as a whole.'" (quoting *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991)). And because the INA shows a clear preference for family unity, it is most improbable that Congress altered the text of Section 212(c) in a way that would undermine that goal.

3. The Government Cannot Rely On The Assertion That Congress Was Ignorant Of The Imputation Rule As A Reason To Reject It.

Against this background, the government is attempting to make lemons into lemonade when it declares that there is no indication Congress "considered the possibility, let alone intended, that the period of LPR status or residence after lawful admission of * * * the alien's parent * * * would satisfy the new statutory requirements." U.S. Br. 26. We look at this same history and draw quite a different conclusion: The government can point to *no* evidence that Congress *intended* to change the settled imputation rule, evidence one would have expected to find if Congress truly meant to specially disadvantage children and depart not only from the established rule of imputation, but also from general INA policy.

Nor can the government escape this conclusion by arguing that "there is no indication that the imputation issue was ever called to the attention of Congress." U.S. Br. 27. "We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent." *Merck & Co.* v. *Reynolds*, 130 S. Ct. 1784, 1795 (2010). "[I]f anything is to be assumed from the congressional silence on this point, it is that Congress was aware of the * * * rule and legislated with it in mind." *Albernaz*, 450 U.S. at 341-342. Congress is "predominantly a lawyers' body" (*Callanan* v. *United States*, 364 U.S. 587, 594 (1961)), and it is appropriate "to assume that our elected representatives * * * know the law." *Cannon* v. *Univ. of Chicago*, 441 U.S. 677, 696-697 (1979). See also *Edelman* v. *Lynchburg Coll.*, 535 U.S. 106, 116-117 & n. 13 (2002); *U.S. R.R. Ret. Bd.* v. *Fritz*, 449 U.S. 166, 179 (1980) (stating that we should not assume "Congress was unaware of what it accomplished.").

The government's assumption of congressional ignorance not only violates accepted norms of statutory interpretation but is also facially implausible. The overwhelming number of immigration cases arise in the Second and Ninth Circuits,[13] which had

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[13] While data disaggregating the number of immigration cases from all administrative cases is unavailable prior to 2002, recent data demonstrates the disproportionate number of immigration cases arising in the Second and Ninth Circuits. In 2010, for example, the Ninth Circuit received 3,169 appeals from the BIA, and the Second Circuit heard 1,299. Admin. Office of the U.S. Courts, Judicial Business of the United States Courts, 2010 Annual Report of the Director 97, 100 tbl. B-3. The combined total from these two circuits represents almost two-thirds of the 6,750 total appeals from the BIA. *Id.* at 96.

both adopted the imputation rule pre-IIRIRA, and the imputation rule therefore likely would have applied to the vast majority of aliens in the United States at the time of IIRIRA's enactment. It is highly unlikely that Congress was unaware of a settled rule that affected most of the aliens in the nation. Certainly, the government's unsupported assertion to the contrary offers no basis for accepting its proposed rule.

C. "Resided Continuously" Is A Term Of Art With A Longstanding And Well-Settled Meaning In The Immigration Context, And Includes Imputable Components Of Intent And Residence.

Against this background, the government's argument from the text and policy of Section 1229b(a)(2) reduces to a single proposition: that, even if unintentionally, Congress eliminated the imputation rule by hinging the availability of relief on the applicant's having "resided continuously," rather than on having maintained "unrelinquished domicile," in the United States. This is "meaningfully different operative language," the government maintains, because "domicile turns on intent, whereas residence does not"; the imputation rule rested on imputation of intent; and "there is no longer any intent-based requirement on which imputation (or ratification thereof) could be predicated." U.S. Br. 28-29. But even disregarding the improbability of the assertion that Congress achieved such a significant change inadvertently, this argument is wrong as a textual matter, for two reasons: The language used by Congress in Section 1229b(a)(2) *does* hinge the availability of relief on intent; and residence *was* imputed under Section 212(c).

1. A Test That Requires A Finding That The Applicant "Resided Continuously" In The United States Requires Consideration Of The Applicant's Intent.

In arguing that Section 1229b(a)(2) must have the effect of repudiating the imputation doctrine, the government notes that 8 U.S.C. § 1101(a)(33), defines "residence" without regard to intent. U.S. Br. 28. But Section 1229b(a)(2) uses a different term, "resided * * * continuously," which is not defined in the INA. And that term—which appears at numerous points in the INA—is a term of art that has long been used and has *always been understood to include an intent component*, notwithstanding the presence in the INA of Section 1101(a)(33), which was drafted almost sixty years ago. In this respect, the term "resided continuously" is no different from the term "unrelinquished domicile" that, as used in Section 212(c), was understood to allow for imputation. If intent (and a child's legal inability to formulate it) is the linchpin of imputation, Section 212(c) and Section 1229b(a)(2) are in the relevant sense identical.

a. "Resided continuously" is a term of art in immigration law that has always required consideration of intent. That is clear from the BIA's decisions pre-IIRIRA (the backdrop against which Section 1229b(a)(2) was enacted) that intent was central to determinations of continuous residence.[14]

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[14] Unlike "unrelinquished domicile," which now appears nowhere in the INA and appeared only in Section 212(c) before IIRIRA, "resided continuously" appears throughout the INA. See, *e.g.*, 8 U.S.C. §§ 1254a, 1255a, 1259, 1427, 1430, 1435, 1437, 1439, 1445.

In 1952, the same year that Congress enacted the INA, the BIA interpreted a 1940 statute under which the appellant would be a citizen provided she "ha[d] *resided continuously in the United States* since the date of her marriage." *In re A.*, 4 I. & N. Dec. 723 (B.I.A. 1952) (emphasis added). The Board wrote:

> [T]he term "resided continuously" within the United States has been found in laws relating to naturalization since the basic naturalization act of June 29, 1906. It was well settled at the time of the amendment of July 2, 1940 * * * that temporary absences *unaccompanied by an intent to abandon residence in the United States*, did not operate to interrupt the continuity of residence * * *.

Id. at 725 (emphasis added). The Board found that the "continuity of residence" was not broken because, in the circumstances, "a finding of abandonment of domicile in the United States is required" to show an intent to abandon residence in the United States. *Ibid.* Thus, the Board equated non-abandonment of domicile in the United States—that is, unrelinquished domicile—with "resided continuously."[15] *Ib-*

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[15] The equivalence of continuous residence and unrelinquished domicile also can be seen in Board interpretations of Section 212(c). See, *e.g.*, *In re Loza-Bedoya*, 10 I. & N. Dec. 778, 779 (B.I.A. 1964) ("The first contention couples Section 212(c) of the Act and its predecessor, the 7th proviso to Section 3 of the Act of February 5, 1917. *Section 212(c) of the Act authorizes the admission of an inadmissible alien returning to a lawful residence*; the 7th proviso authorized the same relief (except as to documentary grounds) to an alien with seven years' residence whether the residence was lawful or not." (emphasis added)). Even though Section 212(c) used the term "domicile," the Board wrote interchangeably of "residence."

id. It was the "intent to abandon" (or not) that determined continuity of residence. *Ibid.*[16]

The importance of intent to the abandonment of continuous residence, as well as of unrelinquished domicile, has been an element of immigration law ever since. For example, it is well established that an immigrant may maintain a continuous (or permanent) residence in the United States despite a temporary visit abroad. See, *e.g.*, *Singh* v. *Reno*, 113 F.3d 1512, 1514 (9th Cir. 1997) ("[A] legal permanent resident may plan * * * a relatively short trip. He may extend his trip beyond that relatively short period * * * if he intends to return to the United States as soon as possible thereafter."). In determining whether temporary visits abroad break periods of continuous or permanent residence, it is "the *intention* of the alien, when it can be ascertained, [that] will control." *In re Huang*, 19 I. & N. Dec. 749, 753 (B.I.A. 1988) (emphasis added).[17] That intent is assessed

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[16] This was not a novel conclusion. For the purpose of the precursor to INA Section 212(c), "domicile" was considered "synonymous with actual residence or place of abode." *In re C.*, 1 I. & N. Dec. 631, 633 (B.I.A. 1943). Domicile was further defined by regulation to mean "that place where a person has his true, fixed, and permanent home and principal establishment and to which whenever he is absent he has the intention of returning." *Id.* at 635-636. "Note should be made in this connection that *the courts regard residence and domicile as synonymous terms* under the naturalization statutes." *Id.* at 638 (emphasis added).

[17] That continuity of residence turns on intent rather than physical presence is reflected in the text and structure of Section 1229b. Physical presence ends when an alien "has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days." 8 U.S.C. § 1229b(d)(2). No such concrete or objective limitation determines continuous residence.

based on such factors as "location of his family ties, property holdings, and job." *Ibid.* And because a child is incapable of forming the relevant intent—or, for that matter, ties based on property holdings and vocation—a child's "*residence* is imputed [from] his parents while a minor" in making the continuous residence determination. See *In re Ng*, 12 I. & N. Dec. 411, 412 (B.I.A. 1967) (emphasis added).

It is not at all surprising that Congress and the BIA understood the terms of art "resided continuously," "temporary residence," and "permanent residence" to require consideration of intent even when the location of the alien's physical residence could be determined; the term "residence" has, in the common law, always contained an intent component. See *Martinez* v. *Bynum*, 461 U.S. 321, 330 (1983) ("'residence' generally requires both physical presence and an intention to remain."). As the New Jersey Supreme Court put it, in a decision cited approvingly by this Court in *Holyfield*, 490 U.S. at 48:

> At common law, residence and domicile were not synonymous, the difference between them being one of intention. Thus, *for residence there must have been an intention to live in a place for the time being*, whereas, for domicile * * * it was necessary that there be an intention not only to live in the place but also to make a home there.

Perri v. *Kisselbach*, 167 A.2d 377, 379 (N.J. 1961) (emphasis added). This common law definition of residence remains the law today. See, *e.g.*, *Saenz* v. *Roe*, 526 U.S. 489, 517 (1999) (residence requires "both physical presence and an intention to remain"). Congress thus would not have regarded it as at all ano-

malous for a "resided continuously" test to require consideration of intent.

b. This Court also has noted the similarity between "continuous residence" and domicile in immigration law, and has recognized that *both* residence and domicile are distinct from the concept of "continuous physical presence." Thus, in *INS* v. *Phinpathya*, 464 U.S. 183 (1984), the Court held that continuous physical presence, unlike continuous residence, is terminated by temporary absence. A law enacted in 1948 had allowed suspension of deportation for aliens who "resided continuously in the United States for seven years or more." *Id.* at 190. The law was subsequently changed to replace the "seven year 'continuous residence' requirement with the current seven year 'continuous physical presence' requirement." *Ibid.* In explaining the meaning of the current and former laws, the Court wrote: "Had Congress been concerned only with 'non-intermittent' presence or with the mere *maintenance of a domicile or general abode*, it could have retained the 'continuous residence' requirement. Instead, Congress expressly opted for the seven year 'continuous physical presence' requirement." *Id.* at 191 (emphasis added).

The Court thus expressly equated "maintenance of a domicile" (*i.e.*, unrelinquished domicile) with "continuous residence."[18] *Phinpathya* was the leading

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[18] The distinction between continuous residence and continuous physical presence embraced by the *Phinpathya* Court had been recognized two decades earlier by the BIA. Prefiguring the Court's approach, the Board wrote:

> The Congress of the United States in amending [Section 244(a) of INA in 1962] had an opportunity to change the terminology of the statute to require continuous residence in the United States instead of continuous physical

interpretation from the Court of the meaning of "resided continuously" in immigration law before IIRIRA, and it underscores the settled meaning of the term of art that Congress is presumed to have shared when enacting Section 1229b(a)(2).

c. Additional evidence that Congress has been aware of both the meaning of "resides continuously" and of the distinction between continuous residence and continuous physical presence comes from 8 U.S.C. § 1255a, which was enacted before IIRIRA. Section 1255a allows illegal immigrants to acquire temporary resident status (8 U.S.C. § 1255a(a)) and then permanent resident status. 8 U.S.C. § 1255a(b). To be eligible for temporary resident status, the alien must have resided continuously (and unlawfully) in the United States since 1982, and have been continuously physically present in the United States since November 1986. This statute preserves the distinction between physical presence and residence embraced by the Court in *Phinpathya*. Section 1255a, however, modifies the strict meaning of continuous physical presence (*no* absences from the United States) embraced by the Court in *Phinpathya*, expressly allowing for "brief, casual, and innocent absences from the United States." 8 U.S.C. § 1255a(a)(3)(B). Continuous residence, under 8 U.S.C. § 1255a(a), is less exacting than continuous physical presence, allowing for absences from the United States with the intent to return.

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presence. Congress failed to make any such change in the continuous physical presence requirements * * *. Clearly, the term "continuous physical presence" can in nowise be equated with the term "continuous residence."

In re Graham, 11 I. & N. Dec. 234, 238 (B.I.A. 1965).

The importance of intent to return to continuous residence is made explicit with regard to the second provision of 1255a (8 U.S.C. § 1255a(b)), which allows conversion of temporary resident status to permanent resident status. Continuous residence as a temporary resident (which is necessary for permanent residence) is not interrupted by

> brief and casual trips abroad as *reflect an intention* on the part of the alien to adjust to lawful permanent resident status * * * and after brief temporary trips abroad occasioned by a family obligation involving an occurrence such as the illness or death of a close relative or other family need.

8 U.S.C. § 1255a(b)(3)(A) (emphasis added).

d. It should be added that the government mentions the INA's definition of "residence" in Section 1101(a)(33) in connection with its discussion of intent almost in passing. See U.S. Br. 28. There is good reason for that; the context and purpose of the provision shows that it has no bearing on the question here.

Section 1101(a)(33) was first enacted as part of the original INA in 1952 to codify this Court's definition of "residence" in *Savorgnan* v. *United States*, 338 U.S. 491 (1950). In that decision, the Court interpreted a nationality act that stipulated that expatriation of nationals could occur, in part, "if and when the national thereafter takes up a residence abroad." 338 U.S. 491, 493 n.2 (1950) (quoting Nationality Act of 1940, Section 403). That same statute stated that, in relevant part, "the place of [the] general abode shall be deemed [the] place of residence." *Id.* The petitioner had resided in Europe with her husband, an Italian citizen, for many years, but the

district court found that she "did not intend to establish a 'permanent residence' in any country other than the United States." *Id.* at 495-496 (citing *Savorgnan* v. *United States*, 73 F. Supp. 109 (W.D. Wis. 1947)). But this Court found that intent was irrelevant for the purposes of establishing a "residence abroad":

> In contrast to such terms as: 'temporary residence,' 'domicile,' 'removal, with his family and effects,' 'absolute removal' or 'permanent residence,' the new Act used the term 'residence' as plainly as possible to denote an objective fact. To identify the required 'place of residence,' it required only that it be the 'place of general abode.'

Id. at 504-505. The Court thus contrasted the unadorned term "residence" with qualified uses of the term, such as "temporary residence" and "permanent residence," as well as with "domicile." Unlike all of those other terms, "residence" used in isolation was understood to "denote an objective fact."

The meaning of "residence" as used in *Savorgnan* was codified in 1952 as 8 U.S.C. § 1101(a)(33). The report that accompanied the bill, from the House Committee on the Judiciary, stated: "This definition is a codification of judicial constructions of the term 'residence' as expressed by the Supreme Court of the United States in Savorgnan v. United States (338 U.S. 491 (1950))." H.R. Rep. No. 82-1365, at 33 (1952).

The definition of "residence" in Section 1101(a)(33) thus has no bearing on the meaning of a term like "resided continuously," in which "resides" is qualified by a temporal or descriptive term that nec-

essarily turns on intent. That proposition is not controversial. In fact, it has been expressly embraced by the BIA itself in its application of the term "lawful permanent residence," a companion term to "resided continuously" that also appears in Section 1229b(a). As to that, the BIA has held: "The definition of 'residence' in section 1101(a)(33) of the Act, which would preclude consideration of the alien's 'intent' in proceeding or remaining abroad, is inapplicable in determining whether an alien has abandoned her lawful permanent resident status." *Huang*, 19 I. & N. Dec. at 754. Exactly the same conclusion applies here. Whether someone has "resided continuously" in the United States for a given period always has been understood to turn on that person's intent, and in that respect the language of Section 1229b(a)(2) is identical to that of Section 212(c).

2. *"Residence" As A Legal Construct Consistently Has Been Imputed As An Element Of Domicile.*

Congress accordingly used a term in Section 1229b(a)(2)—"resided continuously"—that it would have known would require an inquiry into intent, and thus would have led to imputation of a parent's "continuous residence" to a child. But even if that were not so, Congress would have expected a parent's residence to be imputed to a child for a different reason: Residence, even as a "principal, actual dwelling in fact," has consistently been imputed from parent to child as an element of the imputation of domicile.

Domicile and residence are in large part coextensive because those domiciled in a particular place must also be resident there. More than a century ago, this Court described domicile as "[a] residence at

a particular place accompanied with positive or presumptive proof of an intention to remain there for an unlimited time." *Mitchell* v. *United States*, 88 U.S. 350, 352 (1874) (citation omitted). The definition of domicile as a union of current residence and intent to make that residence one's "home" has been universally accepted by the common law ever since. See, *e.g.*, *Texas* v. *Florida*, 306 U.S. 398, 424 (1939) ("[R]esidence in fact, coupled with the purpose to make the place of residence one's home, are the essential elements of domicile").

As a consequence, in each instance where courts imputed a parent's domicile to a child under Section 212(c), they also, by extension, necessarily imputed the parent's residence to the child because there can be no domicile without residence. Thus, none of those pre-IIRIRA courts required a showing that the child was present in the United States during his or her parents' period of domicile. See, *e.g.*, *Rosario*, 962 F.2d at 225. Although the opinions pointed to the "intent" component of domicile in explaining the imputation rule, the courts notably did not require that the child separately establish residence in the United States during this period. If they had done so, they would have been imputing the parent's intent *only*. Instead, as the *Rosario* court put it, "a minor admitted into the United States might derive lawful domicile from a parent already present for seven years, thereby making that person eligible for § 212(c) relief *on the very day of arrival*." 962 F.2d at 225 (emphasis added).

Courts accordingly were imputing more than the parent's intent to remain—they were imputing the parent's period of residence as well. And the reason they did so is clear: The common thread running

through the immigration cases is the child's lack of capacity independently to satisfy the legal requirement. See, *e.g.*, *Lepe-Guitron*, 16 F.3d at 1026 (imputation required "since most children are *presumed not legally capable* of forming the requisite intent" (emphasis added) (quoting *Rosario*, 962 F.2d at 224)); see also *Mercado-Zazueta*, 580 F.3d at 1105 ("[W]e have allowed imputation precisely because the minor either was legally incapable of satisfying one of these criteria or could not reasonably be expected to satisfy it independent of his parents." (internal quotation marks omitted)).

Congress therefore must have understood the reasoning of these decisions to extend to all areas where a child lacks legal capacity. For example, children lack the capacity to navigate the "complications" of the immigration system on their own. See *Mercado-Zazueta*, 580 F.3d at 1112. Similarly, a child lacks the legal capacity to prove that a particular dwelling is his or her "principal" one. Such a determination is made through examination of the "typical indicia of residence [such] as the maintenance of a bank account in this country and continued membership in a domestic union." *Mrvica* v. *Esperdy*, 376 U.S. 560, 565 (1964). A child lacks the capacity to acquire these "typical indicia": "Children * * * normally lack the material and psychological wherewithal to decide where they will reside." *Mozes* v. *Mozes*, 239 F.3d 1067, 1076 (9th Cir. 2001).

Thus, the language, context, and policy of the statute lead to a conclusion quite different from that drawn by the government. At the time Congress enacted Section 1229b(a)(2), the imputation rule was settled and noncontroversial. No one suggests that Congress acted with the purpose of changing that

rule; such a suggestion could not be squared with actions Congress took to liberalize the rules governing eligibility for relief in other respects. And Congress chose language for Section 1229b(a)(2) that, in relevant part, is analytically identical to the superseded language of Section 212(c)—and that Congress is presumed to have known would have provided for imputation. The government's contrary submission, which rests on the proposition that Congress accidentally eliminated imputation through its choice of a term selected for a different reason, simply does not stand up to scrutiny.

II. THE BIA'S REJECTION OF IMPUTATION IS NOT ENTITLED TO DEFERENCE.

Having little else to say, the government ultimately retreats to an argument for deference to the BIA under step two of the *Chevron* analysis. But viewed in context and in its entirety, Section 1229b(a)(2) must be read to permit imputation; there is no room for deference to the agency. And even if that were not the case, the BIA's approach should be rejected as "arbitrary or capricious in substance" in light of the agency's inconsistent positions regarding imputation, and as "manifestly contrary to the statute" considering the INA's overarching purposes. *Mayo Found. for Med. Educ. & Research* v. *United States*, 131 S. Ct. 704, 711 (2011) (quoting *Household Credit Servs., Inc.* v. *Pfennig*, 541 U.S. 232, 242 (2004)).

A. The Meaning Of Section 1229b(a)(2) Clearly Supports Imputation, Leaving No Reason To Defer To The Agency Under *Chevron*.

Under step one of the *Chevron* analysis, the Court will first consider whether "the statute is silent or ambiguous with respect to the specific issue." *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). As the Court explained in a decision interpreting a different aspect of IIRIRA's alteration of former INA Section 212(c), "We only defer * * * to agency interpretations of statutes that, applying the normal 'tools of statutory construction,' are ambiguous." *St. Cyr*, 533 U.S. at 320 n.45 (quoting *Chevron*, 467 U.S. at 843 n.9). Here, the ordinary tools of statutory construction show that the purpose of Section 1229b(a)(2) is unambiguous and leaves no room for the exercise of agency discretion.

First, as we have explained, Congress did not mean to disturb the settled construction of the former Section 212(c); it chose language that would have been understood to provide for imputation; and rejection of imputation runs counter to the thrust of the liberalized relief provision. Second, Section 1229b(a) should be read in light of the INA's overall and undisputed goal of promoting family unity. *Cf. Gen. Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 600 (2004) (finding that "regular interpretative methods," including the structure and history of the statute and its "relationship to other federal statutes," leave no room for *Chevron* deference on the question at issue). And third, the Court generally applies the "longstanding principle [in immigration law] of construing any lingering ambiguities in deportation sta-

tutes in favor of the alien." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (citing *INS* v. *Errico*, 385 U.S. 214, 225 (1966); *Costello* v. *INS*, 376 U.S. 120, 128 (1964); *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10 (1948)). These usual tools of statutory construction lead to a conclusion that children should be able to impute their parents' period of continuous residence under Section 1229b(a)(2), as they were under former Section 212(c).

B. Even If The Meaning Of The Statute Is Not Entirely Clear, The BIA's Interpretation Is Not Owed Deference.

Even if the Court rejects the conclusion that the statute clearly permits imputation of continuous residence after lawful admission, and finds that Section 1229b(a) is silent or ambiguous with respect to imputation, the BIA's refusal to allow imputation in this context is not "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. In fact, the government has remarkably little to say in favor of deference to the BIA's view. Most of its argument is negative; it asserts that its rejection of imputation here is not inconsistent with its use of imputation elsewhere (U.S. Br. 38-39), and that the Ninth Circuit's rationale for employing imputation is not supported by the statute. U.S. Br. 35-38. On the face of it, these arguments hardly serve to affirmatively justify the BIA's rule. Deference is owed to an administrative agency only if "Congress has explicitly left a gap for the agency to fill" *Chevron*, 467 U.S. at 843, and only "when the agency has exercised its *own* judgment, not when it believes that interpretation is compelled by Congress." *Arizona* v. *Thompson*, 281 F.3d 248, 254 (D.C. Cir. 2002) (internal quotation marks omitted). Since, here, the BIA believed its re-

sult was compelled by statutory language, it was not exercising its discretion and therefore is not owed deference. But even if that were not so, the government's arguments fail on their own terms.

1. The Board's Interpretation Has Been Inconsistent.

In arguing that the BIA's treatment of imputation has been consistent, the government maintains that the BIA has permitted imputation of intent but not of "objective conduct." U.S. Br. 39. But that is not so: In practice, the BIA has imputed both states of mind *and* objective conduct from parents to minor children in situations where imputation would harm the alien, but disallowed imputation in situations where imputation would benefit the alien. That is the essence of an interpretation that is "arbitrary or capricious in substance." *Mayo Found.*,131 S. Ct. at 711 (quoting *Pfennig*, 541 U.S. at 242).

On the one hand, as we have shown, continuous residence *does* turn on intent. The government offers no reason for treating it differently from those situations where it acknowledges that imputation is warranted.

And the converse is true as well: The BIA often does impute "objective conduct" from parents to children. Thus, in *Vang* v. *INS*, 146 F.3d 1114, 1117 (9th Cir. 1998), the court noted that the BIA imputes a parent's "firm resettlement" in a third country to children for the purposes of asylum eligibility in the United States; if an applicant for asylum is deemed to have "firmly resettled" in a third country, he or she is ineligible for asylum here. Agency regulations define "firm resettlement" as follows: "An alien is considered to be firmly resettled if, prior to arrival in

the United States, he or she entered into another country with, or while in that country received, an offer of permanent resident status, citizenship, or some other type of permanent resettlement." 8 C.F.R. § 208.15. This definition of "firm resettlement" does *not* involve any sort of "intent" or "state of mind" element (unless, contrary to the government's contention, residence status is understood to have an intent component); rather, it involves objective conduct (entering a third country) and a government's "official action" with regard to the alien (offering some form of legal status).

The Board's analysis in *In re Ng* illustrates the agency's practice of imputing residence in making the "firm resettlement" determination. After noting that the asylum applicant's father owned a business in Hong Kong and was "certainly resettled" there, the Board stated that "[t]he applicant's *residence* is imputed to his parents while a minor." 12 I. & N. Dec. 411, 412 (B.I.A. 1967) (emphasis added). However this BIA rule is regarded, it is inconsistent with the government's position here; either residence turns on intent, or the agency imputes residence regardless of intent.

The BIA also has imputed objective circumstances under Section 212(k) of the INA, which provides an exception from inadmissibility for immigrants whose ineligibility for admission "was not known to, *and could not have been ascertained by the exercise of reasonable diligence* by, the immigrant." 8 U.S.C. § 1182(k) (emphasis added). The failure to "exercise * * * reasonable diligence" prong is not a mental state; it is objective conduct on the part of the parent. In *In re Aurelio*, 19 I. & N. Dec. 458 (B.I.A. 1987), the BIA "conclud[ed] that the female applicant

failed to exercise reasonable diligence in ascertaining her admissibility to the United States * * *. We therefore find that the immigration judge properly denied the applicants' [including the female applicant's minor son] section 212(k) waiver request." See also *Senica* v. *INS*, 16 F.3d 1013, 1016 (9th Cir. 1994) ("The BIA's decision here was not a departure from its previous practice of imputing a parent's state of mind, *or failure to reasonably investigate*, to an unemancipated minor child." (emphasis added)).

The BIA's inconsistency on the treatment of imputation makes agency deference inappropriate. There can be little doubt that "the consistency of an agency's position is a factor in assessing the weight that position is due." *Good Samaritan Hosp.* v. *Shalala*, 508 U.S. 402, 417 (1993); see also *Judulang*, slip op. 18 (indicating that "we cannot detect the consistency that the BIA claims has marked its approach to this issue," and, "[t]o the contrary, the BIA has repeatedly vacillated in its method for applying § 212(c) to deportable aliens"); *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 480 (1992) ("[I]nconsistency * * * in itself weakens any argument that the Board's interpretation is entitled to some weight.").

While *any* inconsistency "considerably" undercuts the deference owed to an agency's "interpretation" of a statute (*Cardoza-Fonseca*, 480 U.S. at 446 n.30), "[*u*]*nexplained* inconsistency" is an especially strong indicator of "arbitrary and capricious" reasoning (*Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (emphasis added)) that precludes deference. See *United States* v. *Mead Corp.*, 533 U.S. 218, 227 (2001). And an agency's consistency in application of the law applies

not just to singular statutory provisions, but to parallel areas of the statutes it administers. See *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-133 (2000) (Congress is presumed to have intended to create coherent regulatory schemes). That is just what we have here.

2. The Board's Interpretation Of Section 1229b(a) Is "Manifestly Contrary To The Statute."

In addition, the Board's interpretation of Section 1229b(a) is "manifestly contrary to the statute" (*Mayo Found.*, 131 S. Ct. at 711), given that one of the overarching goals of the INA is promoting family unity. The structure of the visa family preference system, as well as specific provisions of the Act, supports this view. It would be contrary to the overall family-unity purpose of the Act to deny children the ability to impute their parent's continuous residence so as to achieve eligibility for cancellation of removal.

Three of the INA's four family preference categories are designed to reunite parents and children.[19] See 8 U.S.C. § 1153(a)(1) (allowing admissions for unmarried sons and daughters of U.S. citizens); 8

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[19] Congress places a particularly high priority on reuniting parents with minor children. For example, in 1990, Congress subdivided the second preference category into subsections A and B, to ensure that a higher percentage of admissions would go to spouses and minor children as opposed to children who had already reached age twenty-one. Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978. The history of the INA confirms this view. See H.R. Rep. No. 85-1199, at 6 (1957) ("The legislative history of the Immigration and Nationality Act clearly indicates that the Congress intended to provide for a liberal treatment of children * * *.").

U.S.C. § 1153(a)(2) (allowing admissions for spouses and minor children of lawful permanent residents); 8 U.S.C. § 1153(a)(3) (allowing admissions for married sons and daughters of U.S. citizens). The family preference system is an integral part of immigration law, and represents a significant proportion of the visas granted every year. In 2010, for example, 214,589 people entered under a family preference visa.[20] Department of Homeland Security, Office of Immigration Statistics, 2010 Yearbook of Immigration Statistics 18 tbl. 6 (Aug. 2011), *available at* http://tinyurl.com/3vcuse5.

Other provisions of the INA likewise demonstrate a clear preference for family unity. For example, Section 203(d) of the INA provides that spouses and children of aliens who qualify for a family-preference, employment-based, or diversity visa may be admitted in the same preference category, and in the "same order or consideration" as the principal alien. 8 U.S.C. § 1153(d). In addition, 8 U.S.C. § 1182(a)(6)(E)(ii) codifies the "[s]pecial rule in the case of family reunification." This provision provides a waiver of excludability for certain immigrants who "encouraged, induced, assisted, abetted, or aided only the alien's spouse, parent, son, or daughter (and no other individual) to enter the United States in viola-

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[20] In addition, 476,414 people entered as immediate relatives of United States citizens in 2010. Department of Homeland Security, Office of Immigration Statistics, 2010 Yearbook of Immigration Statistics 18 (Aug. 2011), *available at* http://tinyurl.com/3vcuse5. The total number of people admitted lawfully to the United States was 1,042,625, so family-sponsored or immediate-relative entries (a combined total of 691,003 people) represent two-thirds of the total number of entries. *Ibid.*

tion of law." *Ibid.* And the legislative history of the INA more generally demonstrates that family unity was an extremely important consideration for the drafters of the INA. See H.R. Rep. No. 82-1365, *reprinted in* 1952 U.S.C.C.A.N. 1653, 1680 (commenting on "the underlying intention of our immigration laws regarding the preservation of the family unity").

Finally, imputation cannot be thought inconsistent with congressional intent on the theory, hinted at by the government, that it threatens vastly to expand the category of aliens allowed to remain in the United States. U.S. Br. 27. After all, the sole issue here is *eligibility* for cancellation relief, not cancellation itself. Thus, "any practical effect on policing our Nation's borders * * * is a limited one"; while respondent will be eligible to apply for cancellation if he prevails before this Court, "[a]ny relief he may obtain depends upon the discretion of the Attorney General." *Carachuri-Rosendo* v. *Holder*, 130 S. Ct. 2577, 2589 (2010). See also *Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1480 (2010) (describing the "equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses"); *Mercado-Zazueta*, 580 F.3d at 1115 (noting that the Ninth Circuit's imputation rule "merely grant[s] access to the possibility of cancellation of removal, leaving the ultimate determination to the sound discretion of the Attorney General").

The Attorney General thus retains unreviewable authority to deny cancellation. See 8 U.S.C. § 1252-(a)(2)(B)(i). As a consequence, the only real effect of the rule we advocate is to *permit* the Attorney General to exercise his discretion in favor of an alien who merits relief, and who otherwise would be removed

from the country no matter how compelling his or her case to stay.

In all, the government's reading of the statute disregards the analytical consistency between the language of Section 1229b(a)(2) and Section 212(c); departs from the particular congressional goal in amending the relief provision and the broader purpose of the INA; and is inconsistent with the BIA's position in clearly analogous circumstances. The Court should reject such an approach.

CONCLUSION

The judgment of the court of appeals should be affirmed, and the case remanded for further proceedings.

Respectfully submitted.

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REPLY BRIEF

Nos. 10-1542 and 10-1543

In the Supreme Court of the United States

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
PETITIONER

v.

CARLOS MARTINEZ GUTIERREZ

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
PETITIONER

v.

DAMIEN ANTONIO SAWYERS

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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DAMIEN ANTONIO SAWYERS

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

The Ninth Circuit has held that aliens who do not personally satisfy the eligibility requirements for cancellation of removal under 8 U.S.C. 1229b(a)(1) and (2)—that is, who have not had the status of a lawful permanent resident (LPR) for at least five years and who have not continuously resided in the United States for at least seven years after they have been admitted by immigration authorities—may nevertheless become eligible for such relief by relying on a parent's period of LPR

status and continuous residence after admission. The Ninth Circuit's imputation rule finds no support in the text of Section 1229b(a) or its legislative history, and it is contrary to the authoritative interpretation of the Board of Immigration Appeals (BIA or Board). Although respondents attempt to defend the rule by reference to lower courts' interpretations of other, differently worded immigration provisions and to general policy considerations, their efforts are unavailing.

A. The Plain Text Of Section 1229b(a) Does Not Permit An Alien To Rely On A Parent's Years Of LPR Status Or Residence After Admission By Immigration Authorities

Section 1229b(a) provides that, to be eligible for cancellation of removal, "the alien" seeking relief must, *inter alia*, "(1) ha[ve] been an alien lawfully admitted for permanent residence for not less than 5 years," and "(2) ha[ve] resided in the United States continuously for 7 years after having been admitted in any status." Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, the terms "lawfully admitted for permanent residence" and "admitted" both refer to formal action taken by immigration authorities with respect to an individual alien. See 8 U.S.C. 1101(a)(20); 8 U.S.C. 1101(a)(13)(A). Sections 1229b(a)(1) and (2) require that the alien seeking relief personally achieve the requisite legal status, and remain in that status and reside in the United States for the requisite length of time.

Respondents do not dispute that the text of the statute requires that the alien seeking relief personally fulfill these requirements. They contend (Martinez Gutierrez Br. 16, 20; Sawyers Br. 14-15), however, that Section 1229b(a) is "silent" as to whether an alien can personally

fulfill these requirements by relying on *someone else's* years accrued in the requisite status.

Respondents' argument that Section 1229b(a) by its terms neither authorizes nor forecloses imputing a parent's (or other third party's) years as an LPR or of continuous residence after admission is not helpful to respondents' case: were Section 1229b(a) truly ambiguous on the point, then the BIA's reasonable interpretation of the statute as forbidding imputation would control. See Gov't Br. 33-39; pp. 18-22, *infra*. But the argument is also incorrect. As those courts that ultimately deferred to the BIA's interpretation have acknowledged, "[t]he requirements for cancellation of removal are clear." *Augustin* v. *Attorney Gen. of the United States*, 520 F.3d 264, 270 (3d Cir. 2008); see *Deus* v. *Holder*, 591 F.3d 807, 812 (5th Cir. 2009) (adopting the rationale of *Augustin*). An alien who has not in fact been an LPR for at least five years, or who has not in fact been admitted to the United States by immigration officials and resided continuously in the United States for at least seven years after that admission, has not fulfilled the statutory eligibility requirements for cancellation of removal, regardless of whether a parent (or any other third party) has done so.

It is true, as respondents emphasize, that Section 1229b(a) does not contain language specifically referring to a parent and foreclosing the possibility of imputing the parent's years in the requisite legal status. But "[a] statute can be unambiguous without addressing every interpretive theory offered by a party." *Salinas* v. *United States*, 522 U.S. 52, 60 (1997); see Gov't Br. 20-21. There is no ambiguity here.

B. There Is No Settled Rule Permitting An Alien To Rely On A Parent's Period Of LPR Status Or Residence After Admission

Notwithstanding the clarity of Section 1229b(a)'s text, respondents argue (Martinez Gutierrez Br. 21-22, 28-29, 33-39; Sawyers Br. 14-36) that imputation is a well-accepted feature of immigration law and that Congress thus must have ratified the imputation rule when it enacted Section 1229b(a). But while certain forms of imputation have been permitted under other, differently worded provisions of immigration law, respondents can point to no settled rule that would permit a minor child to rely on a parent's years of LPR status or years of continuous residence in the United States after admission under Section 1229b(a).

1. Appellate decisions interpreting the term "domicile" in former Section 212(c) do not establish any settled understanding about imputing a parent's years of LPR status or residence after admission

a. Respondents' congressional ratification argument relies primarily on three court of appeals decisions interpreting Section 1229b(a)'s predecessor, former Section 212(c) of the INA, which authorized waiver of exclusion (and, by judicial and administrative interpretation, deportation) for "[a]liens lawfully admitted for permanent residence" who had accrued "a lawful unrelinquished domicile of seven consecutive years." 8 U.S.C. 1182(c) (1988); see Gov't Br. 6 n.2.

The decisions on which respondents rely reasoned that the undefined term "domicile" must be construed in light of its meaning at common law. As this Court had explained in *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30 (1989), an adult's "domicile" is

generally "established by physical presence in a place in connection with a certain state of mind concerning one's intent to remain there." *Id.* at 48. But "[s]ince most minors are legally incapable of forming the requisite intent to establish a domicile, their domicile is determined by that of their parents." *Ibid.*; see also *ibid.* (noting that these principles mean that a child's domicile will sometimes be in a place he has never been). Following that common-law principle, courts of appeals construing former Section 212(c) concluded that parents' period of "lawful unrelinquished domicile" could be "imputed" to their minor children. *Lepe-Guitron* v. *INS*, 16 F.3d 1021, 1025 (9th Cir. 1994) ("[A] child's domicile follows that of his or her parents."); *Rosario* v. *INS*, 962 F.2d 220, 224 (2d Cir. 1992) (similar) (citations omitted); see also *Morel* v. *INS*, 90 F.3d 833, 841 (3d Cir. 1996) (similar), vacated on other grounds, 144 F.3d 248 (3d Cir. 1998).

b. Respondents provide no persuasive reason to believe that the Congress that enacted Section 1229b(a) somehow ratified these interpretations of former Section 212(c), much less that Section 1229b(a) incorporates the result in those decisions. As an initial matter, with respect to Martinez Gutierrez, the ratification argument fails on its own terms. There was no consensus among the circuits that would have entitled him to relief even under former Section 212(c). To the contrary, the Ninth Circuit made clear that its imputation rule would *not* apply to an alien who, like Martinez Gutierrez (see Martinez Gutierrez Pet. App. 12a-13a), did not obtain LPR status before the age of 18, *Lepe-Guitron*, 16 F.3d at 1026 n.12, and no other court of appeals disagreed. This flaw greatly undermines respondents' reliance on a notion of ratification more generally.

More fundamentally, even assuming with respect to other applications of former Section 212(c) that three court of appeals decisions qualify as "a judicial consensus so broad and unquestioned that [this Court] must presume Congress knew of and endorsed it," *Jama* v. *Immigration & Customs Enforcement*, 543 U.S. 335, 349 (2005); but cf. *id.* at 351 (doubting force of a two-circuit consensus), the doctrine of congressional ratification applies only when Congress reenacts a statute without change, see *id.* at 349; *Forest Grove Sch. Dist.* v. *T.A.*, 129 S. Ct. 2484, 2492 (2009). That is not the case here. In the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, § 304(a), 110 Stat. 3009-594, Congress repealed former Section 212(c) and enacted a new relief-from-removal provision that differed in important respects from its predecessor. Section 1229b(a) preserved former Section 212(c)'s threshold requirement that the alien have been "lawfully admitted for permanent residence," but added an express durational requirement: that the alien have been in LPR status for at least five years. 8 U.S.C. 1229b(a)(1). It also replaced the seven-year "domicile" requirement with a requirement that the alien have resided continuously in the United States for seven years after admission in any status. 8 U.S.C. 1229b(a)(2).

The Congress that enacted Section 1229b(a) thus not only changed the language of former Section 212(c), but changed it to eliminate the very term—"domicile"—on which prior judicial decisions permitting imputation under Section 212(c) had rested. If Congress is presumed to have been aware of those decisions, then it must also be presumed to have intended that, by eliminating the word "domicile," it was eliminating the textual basis for

those decisions. Contrary to Martinez Gutierrez's suggestion (Br. 37), no other form of "disavow[al]" is needed to conclude that the enactment of Section 1229b(a) did not ratify and much less carry forward the result of those decisions.

2. The text of Section 1229b(a) differs materially from former Section 212(c)

Respondents (Martinez Gutierrez Br. 37-39; Sawyers Br. 17-19, 24-36) both seek to minimize the effect of the change from the text of former Section 212(c) to the text of current Section 1229b(a), but their efforts are unavailing.

a. Focusing on Section 1229b(a)(2)'s requirement that the alien have "continuously resided" in the United States for seven years after having been admitted by immigration authorities, Sawyers argues (Br. 36) that the new requirement is essentially synonymous with former Section 212(c)'s requirement of "lawful unrelinquished domicile." That is incorrect.

i. While the appellate decisions on which respondents rely interpreted the undefined term "domicile" in accordance with the common-law rule that a child's domicile follows that of his parents, no decision establishes that admission and years of residence following admission of the applicant's parent constitute compliance with those requirements by the applicant himself. And indeed, even the rationale underlying the common-law domicile rule—that "minors are legally incapable of forming the requisite intent to establish a domicile," *Holyfield*, 490 U.S. at 48—has no relevance for purposes of Section 1229b(a)(2). In contrast to the undefined term "domicile," neither the term "admitted" nor the term "residence" invites any consideration of the alien's

intent. "Admission" is the conferral of an authorization by immigration officials; it cannot be achieved unilaterally by the actions and intent of the alien, as domicile might. See 8 U.S.C. 1101(a)(13)(A) (defining the terms "admission" and "admitted"). And "residence" is defined as a person's "principal, actual dwelling place in fact, *without regard to intent.*" 8 U.S.C. 1101(a)(33) (emphasis added); see Gov't Br. 17, 28-29.

ii. Sawyers asserts that the term "resided continuously" (unlike the unadorned "resided") is a "term of art" that "has always been understood to include an intent component." Br. 25 (emphasis omitted). "If intent (and a child's inability to formulate it) is the linchpin of imputation," Sawyers reasons, "Section 212(c) and Section 1229b(a)(2) are in the relevant sense identical." *Ibid.* That, too, is incorrect.

As support for his claim that "resided continuously" is a term of art distinct from the defined term "resided," Sawyers cites *In re A-*, 4 I. & N. Dec. 723 (B.I.A. 1952), a Board decision interpreting a 1936 statute that predated the INA's definition of "residence" as being determined "without regard to intent." See Sawyers Br. 26; *id.* at 31 (noting that the current definition of "residence" was enacted as part of the INA in 1952); see also *id.* at 27 n.16 (discussing a 1943 Board decision). Sawyers cites no situations in which the Board has, since 1952, considered "resided continuously" to be a term of art that (unlike "resided") incorporates considerations of intent.[1]

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[1] Sawyers cites (Br. 27-28) the Board's decision in *In re Huang*, 19 I. & N. Dec. 749 (1988), the Ninth Circuit's decision in *Singh* v. *Reno*, 113 F.3d 1512 (1997), and the Regional Commissioner's decision in *In re Ng*, 12 I. & N. Dec. 411 (1967). None of those cases considered the meaning of the term "resided continuously."

In any event, the intent relevant to the discussion of the term "resided continuously" in *In re A-* was not intent to remain in a certain place from a given time forward, as under the law of domicile. It rather concerned the effect of subsequent temporary absences: such absences would not "operate to interrupt the continuity of residence" if "unaccompanied by an intent to abandon residence in the United States." *In re A-*, 4 I. & N. Dec. at 725. The relevant intent thus related not to whether an alien "resided" in a particular place but to whether the alien's residence in that place was "continuous." Thus, while a parent's intent to abandon residence in the United States could be imputed to a minor alien who left the country with the parent, see Gov't Br. 38-39, it does not follow that the parent's intent would similarly be relevant in determining whether the alien has established actual residence in the United States in the first place.[2]

iii. Sawyers also argues (Br. 33-36) that even if Section 1229b(a)(2) forbids any consideration of the alien's

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[2] Contrary to Sawyers's implication (Br. 29-30), this Court in *INS* v. *Phinpathya*, 464 U.S. 183 (1984), did not "equat[e] 'maintenance of a domicile' * * * with 'continuous residence' " except insofar as it observed that both concepts, unlike the concept of "continuous physical presence," accommodate temporary absences from the United States. *Id.* at 191. That observation has no relevance here.

Sawyers's reliance (Br. 30-31) on the legalization provision, 8 U.S.C. 1255a, is also misplaced. There is no indication that Section 1255a's reference to the alien's continuing intention to adjust to LPR status, see 8 U.S.C. 1255a(b)(1)(B)(ii) and (3)(A), has any significance outside the context of that provision. Moreover, the provision does not purport to define the term "resided continuously," instead authorizing the Attorney General to promulgate regulations. 8 U.S.C. 1255a(g). By their terms, the regulations do not incorporate considerations of the alien's intent. See 8 C.F.R. 245a.1(c).

intent, the courts that permitted imputation of domicile under former Section 212(c) were also necessarily imputing residence as an element of domicile. As the authorities discussed in *Holyfield* make clear, the common-law rule that a child's domicile follows that of his parent means that his domicile may be in a location in which he does not in fact reside. See 490 U.S. at 48; see also, *e.g.*, *Yarborough* v. *Yarborough*, 290 U.S. 202, 211 (1933). But even among the few courts of appeals to address the imputation issue, there was no settled consensus as to whether imputation was permissible when the child did not reside in the United States. While the Second Circuit, for example, held that imputation was permissible under those circumstances, see *Rosario*, 962 F.2d at 225, the Ninth Circuit had no occasion to decide the issue because the alien in *Lepe-Guitron* had arrived in the United States at the same time as his parents and remained in the country after that time, see 16 F.3d at 1025. *Lepe-Guitron* did acknowledge the result in *Rosario* with apparent approval, see *id.* at 1026, but in subsequent cases the Ninth Circuit has described *Lepe-Guitron* as limited to unemancipated minors "residing with [their] parents" in the United States. *Cuevas-Gaspar* v. *Gonzales*, 430 F.3d 1013, 1023-1024 (2005); see also *Barrios* v. *Holder*, 581 F.3d 849, 865 (2009).

iv. Residence in the United States alone does not, of course, satisfy Section 1229b(a)(2); the required seven years of continuous residence must follow admission of the alien by immigration authorities. Respondents fail to establish any settled understanding that would permit the requirement that the alien himself have been admitted under the INA to be satisfied by the admission of *someone else*, including the alien's parent. As the government has previously explained, the Ninth Circuit in

Lepe-Guitron had no occasion to consider the issue. See Gov't Br. 37-38. And as the Ninth Circuit emphasized in that case, the alien there seeking relief had entered the United States legally with his parents. 16 F.3d at 1024.[3]

b. With respect to Section 1229b(a)(1)'s separate five-year requirement for LPR status, respondents fail to identify any plausible textual hook for imputation. Martinez Gutierrez argues in passing (Br. 38) that Section 1229b(a)(1)'s reference to "permanent residence" should be understood as inviting the same sort of inquiry into intent as "domicile." But the statute refers to "an alien lawfully admitted for permanent residence," 8 U.S.C. 1229b(a)(1), not "permanent residence" alone. Unlike "resided continuously," the phrase "lawfully admitted for permanent residence" *is* a statutory term of art: "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." 8 U.S.C. 1101(a)(20). The statutory definition of the term thus makes clear that it is a legal status formally conferred by the government; the alien's (or his parent's) unilateral conduct or intent are irrelevant, and the statutory definition accordingly makes no reference to intent.

Any contention that the Congress that enacted Section 1229b(a)(1) intended to endorse imputation of LPR status is particularly untenable. The court of appeals

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[3] Under Ninth Circuit precedent, an *adult's* period of lawful unrelinquished domicile could not begin until she obtained LPR status, rather than on the day she was admitted by immigration authorities. 16 F.3d at 1025; see *id.* at 1024. The court in *Lepe-Guitron* rejected that interpretation with respect to minors. *Id.* at 1025; see *id.* at 1026 n.12 (stating that only adults must be LPRs to accrue years of lawful unrelinquished domicile); Gov't Br. 37-38.

decisions on which respondents rely all made clear that LPR status was a threshold requirement "separate and independent" of the seven-year domicile requirement, and each court accordingly required that the alien child be an LPR in his own right in order to be eligible for Section 212(c) relief. *Rosario*, 962 F.2d at 223; see *id.* at 221; *Lepe-Guitron*, 16 F.3d at 1022-1023, 1026 n.12; see also *Morel*, 90 F.3d at 835, 839.[4] In Section 1229b(a)(1), Congress preserved that threshold requirement, but added a durational requirement to it: that the alien have had his LPR status for at least five years. In the absence of any precedent for imputing LPR status, Martinez Gutierrez cannot plausibly allege the existence of a settled understanding on the subject that Congress might be thought to have ratified.

3. Respondents identify no other authority establishing a settled understanding about imputing a parent's years of LPR status or residence after admission

Respondents' other efforts to establish that imputation is a "pervasive and well-settled" feature of the law, Sawyers Br. 16, are similarly unavailing.

Respondents note, for example (Martinez Gutierrez Br. 22-23; Sawyers Br. 15-16, 40-41), that the BIA has imputed a parent's actual or constructive knowledge to a child in considering whether the child is eligible for relief under 8 U.S.C. 1182(k), which permits the Attor-

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[4] Martinez Gutierrez's assertion (Br. 23) that "no court has viewed [the phrase 'lawfully admitted for permanent residence'] as foreclosing the imputation under former Section 212(c)" is correct only insofar as he means to suggest that no court read that phrase as forbidding an alien child who was an LPR in his own right from relying on imputation to satisfy the separate eligibility condition of seven years of lawful unrelinquished domicile.

ney General to waive inadmissibility if he concludes that "inadmissibility was not known to, and could not have been ascertained by the exercise of reasonable diligence by, the immigrant before the time of departure." See *Senica* v. *INS*, 16 F.3d 1013, 1014-1015 & n.2 (9th Cir. 1994). They also note (Martinez Gutierrez Br. 53-54; Sawyers Br. 27-28) that imputation has been permitted in the context of determining whether an alien has *abandoned* LPR status, an inquiry that implicates considerations of the alien's intent. See, *e.g.*, *In re Huang*, 19 I. & N. Dec. 749, 755 (B.I.A. 1988). Section 1229b(a), by contrast, does not refer to the alien's knowledge or otherwise implicate the alien's state of mind. It refers to a legal status that every individual alien must have been granted by the government in his own right. There is no general background proposition that such a legal status may be imputed from parent to child.

Respondents also rely (Martinez Gutierrez Br. 52; Sawyers Br. 39-40) on cases discussing firm resettlement, but they fail to establish the existence of any settled imputation rule. The administrative decision they cite, which was issued by the Regional Commissioner of the former Immigration and Naturalization Service rather than the Board itself, considered the actions of the minor applicant for refugee classification; the extent to which the decision rested on "imput[ation]" is unclear. *In re Ng*, 12 I. & N. Dec. 411, 412 (1967). And as the Ninth Circuit noted in *Vang* v. *INS*, 146 F.3d 1114 (1998), the BIA in that case had "applied the firm resettlement factors directly to [the minor] rather than to his parents," *id.* at 1117, although the Ninth Circuit affirmed the Board's decision based on consideration of the parents' resettlement, *ibid.*

In any event, isolated examples of cases in which certain forms of imputation have been allowed under unrelated immigration-law provisions provide no support for the proposition that Section 1229b(a) allows imputation to satisfy its distinct requirements.[5]

C. Respondents' Policy Arguments Do Not Permit An Interpretation At Odds With The Statutory Language

Respondents repeatedly assert (Martinez Gutierrez Br. 15, 18, 40-42, 44-48; Sawyers Br. 20-22, 42-45) that Congress could not have intended to forbid imputation under Section 1229b(a) because imputation is consistent with general policy goals of the INA and Section 1229b(a). Respondents' policy arguments cannot override the plain text of Section 1229b(a).

1. As explained in the government's opening brief (at 24-27), the limited legislative history that exists contains no indication that the Congress that enacted Section 1229b(a) even considered the possibility, much less affirmatively intended, that an alien seeking cancellation would be able to rely on someone else's period of LPR status, admission by immigration authorities, or residence after admission. Sawyers argues, however, that Congress could not have intended to preclude imputation, given what he asserts was Congress's intent to

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[5] Respondents likewise fail to establish any general rule that permits courts to impute the conduct of one person or entity to another whenever imputation would "vindicate statutory purposes." Martinez Gutierrez Br. 24. Certainly neither the "responsible corporate officer" doctrine articulated in *United States* v. *Dotterweich*, 320 U.S. 277 (1943), nor cases affirming the place of common-law vicarious or agency liability principles in certain statutory schemes, *e.g.*, *American Soc'y of Mech. Eng'rs, Inc.* v. *Hydrolevel Corp.*, 456 U.S. 556, 567 (1982), stand for any such principle.

"liberalize[] the relief-from-removal rule in other respects." Br. 10; see *id.* at 20-21.

Sawyers's characterization of Section 1229b(a) is incomplete. The legislative history indicates that the Congress that enacted Section 1229b(a) had a number of goals, including resolving a conflict among the circuits about whether the seven years of "lawful unrelinquished domicile" required for relief under former Section 212(c) had to follow the granting of LPR status to the alien or whether the alien could count years in some other lawful status. See Gov't Br. 24-27. In those circuits that had adopted the former rule, Section 1229b(a) did "liberalize" the availability of relief by reducing the required number of years in LPR status from seven to five. But in those circuits that had adopted the latter rule, Section 1229b(a)(1)'s five-year LPR status requirement rendered the statute more, rather than less, stringent than its predecessor.

Other provisions of Section 1229b(a) make clear that Congress did not enact the statute with the purpose of categorically expanding the availability of relief. As Sawyers acknowledges (Br. 20 n.11), Section 1229b(a) limited the availability of relief from removal by adding a new "stop-time" rule designed to ensure that aliens would not accrue time toward eligibility for relief after commission of a specified crime or by delaying their immigration proceedings. See 8 U.S.C. 1229b(a)(3), 1229b(d)(1); Gov't Br. 24-25. It also carried forward a set of new restrictions for aliens convicted of certain crimes. See *INS* v. *St. Cyr*, 533 U.S. 289, 297 (2001) (describing 1990 and 1996 predecessors to Section 1229b(a)(3)). There is thus no reason to believe, based on supposed "liberalizing" effects of Section 1229b(a), that Congress would have wanted courts to recognize an

exception to Section 1229b(a)'s requirements that appears nowhere in the statute's text.

2. Respondents' argument that imputation "serves the dual purpose of promoting family unity and protecting individuals who have strong ties to the United States" (Martinez Gutierrez Br. 1), does not establish that Congress must have intended imputation to be available under Section 1229b(a)(1) and (2).

As an initial matter, respondents do not dispute that the aliens who would seek to invoke the Ninth Circuit's imputation rule are not typically unempancipated minors seeking to reunite or remain with their parents in the United States. They are, rather, adults who—like respondents themselves—seek to avoid removal after committing removable offenses.

In any event, although the goals respondents identify undoubtedly underlie a number of provisions of immigration law, Congress has not single-mindedly pursued those goals without regard to competing objectives. See Gov't Br. 30-33. Virtually any limitation on eligibility for cancellation of removal will have the effect of barring relief for some individuals who may have family or other ties in the United States. But while an alien's family ties and the strength of his ties to the United States are taken into account in deciding whether an alien who is eligible for cancellation of removal should be granted that relief as a matter of discretion, *In re C-V-T-*, 22 I. & N. Dec. 7, 11 (B.I.A. 1998), they cannot serve to make an alien eligible in the first place if he has not fulfilled the statutory requirements.

3. Martinez Gutierrez argues (Br. 19) that imputation is particularly warranted in cases like his because "he was unquestionably eligible for lawful permanent residence from the time his father sought it on his be-

half," and his "delay" in obtaining LPR status was "a product solely of the systemic operation of quotas and the delays inherent in bureaucratic processing of applications." See also *id.* at 42 (stating that "the delay was solely a result of the visa backlog" for children of LPRs).

As a legal matter, Martinez Gutierrez was not in fact eligible for LPR status from the time his father submitted the application, because no visa was immediately available to him. 8 U.S.C. 1255(i)(2)(B). Nor, as a general matter, is the decision whether to grant an application for adjustment to LPR status a mere formality or ministerial act. The rule Martinez Gutierrez asks this Court to adopt would effectively short-circuit the statutory scheme, allowing an alien to benefit from his parent's LPR status even if the alien at the time had not satisfied or could not satisfy the eligibility requirements. See *In re Escobar*, 24 I. & N. Dec. 231, 234-235 (B.I.A. 2007).

It is true, as the government has previously explained, that there has for decades been a backlog for visas allocated to spouses and minor children of certain LPRs. Gov't Br. 31-32. But despite its awareness of that backlog, the Congress did not take action to eliminate or reduce it. *Id.* at 32 & n.11. Furthermore, Congress drafted Section 1229b(a) in a manner that expressly turns on the length of time the alien actually had the status of an LPR after having been formally accorded that status by the government, without regard to whether an alien's adjustment application could have been granted earlier if there had been no visa backlog or other impediment. There is no reason to believe that Congress intended to authorize courts to craft an extra-textual imputation rule to override that requirement or to excuse the alien's non-compliance because of limita-

tions on the availability of visas that are established features of the statutory scheme and experience under it.

4. Respondents' policy arguments ultimately boil down to the proposition that Congress could not have meant what it said when it enacted Section 1229b(a)(1) and (2), and that it could not have intended to do what it did when it eliminated statutory language that some courts had previously interpreted to permit imputation of compliance with one feature of the former Section 212(c). The best evidence of Congress's intent is, however, the text of the statute Congress enacted. In Section 1229b(a), Congress "struck the balance it thought right"; "the judicial role is to enforce that congressionally determined balance." *Milner* v. *Department of the Navy*, 131 S. Ct. 1259, 1265 n.5 (2011).

D. The Board's Reasonable Interpretation Of The Statute Is Entitled To Deference

Section 1229b(a) unambiguously requires that, to be eligible for relief, an alien must in fact have spent no less than five years in the status of an LPR, and no less than seven years residing in the United States following his own admission by immigration authorities. But should the Court conclude that the statute is ambiguous about whether an alien who does not meet the durational requirements is entitled to rely on a parent's years as an LPR or residence after admission, the BIA's interpretation is at a minimum reasonable and entitled to *Chevron* deference. See *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999); *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984).

1. Respondents do not contend (nor could they) that the Board's interpretation of Section 1229b(a), as set out in its published decisions, is inconsistent with the text of

the statute. Rather, they assert that the Board's interpretation is not entitled to deference because it does not reflect the Board's expertise or exercise of discretion, but instead the Board's belief that its interpretation "was mandated by the plain language of the statute." Martinez Gutierrez Br. 29; see also Sawyers Br. 38-39.

Contrary to respondents' characterization, the Board decisions at issue did not stop at step one of the *Chevron* analysis. The Board's analysis departed from the Ninth Circuit's premise that Section 1229b(a) is "silent on the issue of imputing lawful permanent residence." *In re Ramirez-Vargas*, 24 I. & N. Dec. 599, 600 (2008) (citing *Cuevas-Gaspar*, 430 F.3d at 1022). Relying on *Chevron* and *National Cable & Telecommunications Ass'n* v. *Brand X Internet Services*, 545 U.S. 967 (2005), the Board took the position that, despite the Ninth Circuit's contrary precedent, the court was bound to defer to the Board's interpretation at *Chevron* step two. See *Ramirez-Vargas*, 24 I. & N. Dec. at 600-601.

Moreover, the Board's analysis did not rest solely on its reading of the "clear language of the statute." *Escobar*, 24 I. & N. Dec. at 235. The Board also explained that "there is no logical or legal basis to consider the residence of a minor alien's parents in determining whether the minor acquired the necessary years of residence," *id.* at 233; that imputing LPR status from a parent to a child is inconsistent with Board precedent governing adjustment to LPR status, *id.* at 234; that imputation of LPR status is not compelled by Board precedent concerning imputation of the abandonment of LPR status, *id.* at 234 n.4; and that imputation of LPR status would create significant holes in the administration of the statutory scheme, *id.* at 234 n.5. The Board's inter-

pretation was, in short, rooted in the Board's unique authority and expertise.[6]

2. Respondents also claim (Martinez Gutierrez Br. 54; Sawyers Br. 39-42) that the Board is not entitled to *Chevron* deference because the Board's treatment of imputation has been "inconsistent." This argument too lacks merit. Critically, respondents do not dispute that the Board has consistently rejected imputation under Section 1229b(a). And although the Board has imputed a parent's *state of mind* for purposes of evaluating a child's abandonment of LPR status and actual or constructive knowledge of admissibility, it has not imputed a parent's years of LPR status or residence following admission to the parent's minor children. See Gov't Br. 38-39.

Sawyers insists (Br. 39-40) that the firm resettlement cases demonstrate that the Board has imputed "objective conduct," and not just state of mind, from a parent to a child. But as noted above, see pp. 13, *supra*, the Regional Commissioner's decision in *Ng* evaluated the alien child's own "objective conduct," and the extent to which it relied on imputation principles is unclear. But even had the Board itself taken a different approach to imputation in other contexts, that does not mean it was required to allow imputation in the distinct context of Section 1229b(a). And in any event, as "the agency adequately explain[ed] the reasons for" its interpretation of these particular statutory provisions, any purported inconsistency with prior decisions "is not invali-

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[6] Even if this Court were to determine that the Board's analysis was limited by an erroneous belief that its interpretation was compelled by the statutory text, the "proper course" would be to remand to the Board "for additional investigation or explanation." *Negusie* v. *Holder*, 555 U.S. 511, 523 (2009) (citation omitted).

dating, since the whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency." *Brand X*, 545 U.S. at 981 (internal quotation marks and citation omitted).

3. Contrary to respondents' argument (Sawyers Br. 37-38; see also Martinez Gutierrez Br. 54), the BIA's interpretation should not be disregarded on the view that Section 1229b(a) should be construed in favor of the alien. See *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 449 (1987). Even application of the rule of lenity in criminal cases requires more than "[t]he simple existence of some statutory ambiguity"; it requires a "grievous ambiguity" such that, "after seizing everything from which aid can be derived," the Court "can make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks and citations omitted). No such ambiguity is present in this case: Section 1229b(a) plainly requires that an alien actually have been an LPR for at least five years and have continuously resided in the United States for at least seven years after admission.

Moreover, the INA expressly confers on the Attorney General the authority to resolve ambiguities in the first instance. See 8 U.S.C. 1103(a)(1) and (g); *Aguirre-Aguirre*, 526 U.S. at 424-425. If courts were required to resolve any and all ambiguities in the alien's favor, that would wholly usurp the Attorney General's interpretive authority. A court thus properly considers whether statutory ambiguities should be resolved in favor of the alien only after the court has used every interpretive tool at its disposal, including application of deference principles under *Chevron*. Cf. *Negusie* v. *Holder*, 555 U.S. 511, 518 (2009) (the "rule of lenity" may be relevant in reviewing agency action for reasonableness, but does

not establish that a statute is unambiguous such that deference is unwarranted). Because the statute's text, history, and authoritative interpretation by the Board all provide a complete answer to the questions presented, principles of liberal construction have no application.

* * * * *

For the foregoing reasons and those stated in the government's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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JANUARY 2012

SUPPLEMENTAL BRIEF

RECORD AND BRIEFS

No. 10-1542

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IN THE
Supreme Court of the United States

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
Petitioner,

v.

CARLOS MARTINEZ GUTIERREZ,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUPPLEMENTAL BRIEF OF RESPONDENT

Respondent Carlos Martinez Gutierrez wishes to correct certain statements in his merits brief.[1] While the brief correctly states that "[a]pproval of [an I-130] petition filed on behalf of a child is ministerial as long as the parent provides the appropriate evidence of the parent's lawful permanent residence and relationship to the child," Resp. Br. 3, the further statements that adjustment of status "involves little, if any, discretion on the part of the immigration authorities" and "is largely a ministerial function" (*id.* at 3, 43) are inaccurate. Similar to consular processing for an immigrant visa, adjustment of status has separate proof requirements, *see* Resp. Br. 4-5 & n.2, Sarah B. Ignatius & Elisabeth S. Stickney, *Immigration Law and the Family* §§ 8:33-8:46 (2009), and adjustment is a discretionary power of the Attorney General (or, now, the Secretary of Homeland Security), *In re Arai*, 13 I. & N. Dec. 494, 495 (B.I.A. 1970); *cf.* 8 U.S.C. § 1201(a)(1)(A) (establishing discretion of a consular official of the State Department to issue a visa "to an immigrant who has made proper application" under the conditions prescribed by the statute or implementing regulations). While it may be that adjustment applications under a preference for minor children of lawful permanent residents are not commonly denied when supported by the required proof, "[t]heoretically,

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[1] The Clerk of the Court advised counsel for Respondent that a supplemental brief is the proper means of making this correction. Prior to filing this supplemental brief, counsel for Respondent informed counsel for Petitioner about the correction.

since adjustment of status is discretionary, the [U.S. Citizenship and Immigration Services] may deny the adjustment applicant that privilege even if he meets his burden of proof." Ignatius & Stickney, *supra*, § 8.1, at 8-4. Counsel apologizes for the inaccuracy.

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AMICUS CURIAE BRIEF

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ERIC H. HOLDER, JR., ATTORNEY GENERAL
Petitioner,

v.

DAMIEN ANTONIO SAWYERS,
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In re Oscar Padilla, 2008 WL 5477687 (BIA Dec. 8, 2008)	8
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In re Ramirez-Vargas, 24 I. & N. Dec. 599 (BIA 2008)	4

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In re Sawyers, File: A44 852 478, 2007 WL 4711443 (BIA Dec. 26, 2007) 9

In re Saiful Islam, 25 I. & N. Dec. 637 (BIA 2011) 7

In re Silva-Trevino, 24 I. & N. Dec. 687 (BIA 2008) 7, 10, 16

In re Smirko, 23 I. & N. Dec. 836 (BIA 2005) 15

In re Velazquez-Herrera, 24 I. & N. Dec. 503 (BIA 2008) 10, 16

In re Y-C-, 23 I. & N. Dec. 286 (BIA 2003) .. 15

SCHOLARLY AUTHORITIES

Darren H. Weiss, Comment, *X Misses the Spot: Fernandez v. Keisler and the (Mis)appropriation of Brand X by the Board of Immigration Appeals*, 17 Geo. Mason L. Rev. 889 (2010) 21

Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 Tex. L. Rev. 1 (1994) 11

Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295 (2007) 19

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George Robert Johnson, Jr., *The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 Admin. L. Rev. 315 (1987) 17

Margaret H. Taylor, *Refugee Roulette in an Administrative Law Context: The Deja vu of Decisional Disparities in Agency Adjudication*, 60 Stan. L. Rev. 475 (2007) 17

Richard A. Posner, *The Problems of Jurisprudence* 224 (1990) 11

OTHER AUTHORITIES

Board of Immigration Appeals: *Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents*, 73 Fed. Reg. 34,654 (June 18, 2008) 8

Dep't of Homeland Sec., *Statement of Regulatory Priorities*, 75 Fed. Reg. 79536-01, 2010 WL 5677733 (Dec. 20, 2010) 13

Executive Official for Immigration Review, U.S. Dep't of Justice, FY 2007 Statistical Yearbook (2008), *available at* http://www.usdoj.gov/eoir/statspub/fy07syb.pdf 15

Executive Office of Immigration Review, News and Information, http://www.justice.gov/eoir/press/newsinfo.htm (last visited Dec. 20, 2011) 13

Executive Office of Immigration Review, http://www.justice.gov/eoir (last visited Dec. 20, 2011) 13

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Randall Monger and James Yankay, Annual Flow Report, March 2011: U.S. Legal Permanent Residents: 2010, *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_fr_2010.pdf 20

TRAC Immigration, Illegal Reentry Becomes Top Federal Charge (June 10, 2011), http://trac.syr.edu/immigration/reports/251/ 18

U.S. Dep't of Homeland Sec., Office of Citizenship and Immigration Services Ombudsman, Waivers of Inadmissibility: Additional Improvements Needed to Enhance the Current Filing Process and Minimize Reluctance to File (June 10, 2010), *available at* http://www.dhs.gov/xlibrary/assets/cisomb_waivers_of_inadmissibility_recommendation.pdf 20

U.S. Dep't of Justice, FY10 Statistical Year Book (Jan. 2011), *available at* http://www.justice.gov/eoir/statspub/fy10syb.pdf 14, 20

U.S. Sentencing Guidelines Manual § 2L1.2(b)(1)(C) (2010) 18

U.S. State Dep't, Report of the Visa Office 2010, Table I, Immigrant and Nonimmigrant Visas Issued at Foreign Service Posts Fiscal Years 2006-2010, *available at* http://www.travel.state.gov/visa/statistics/statistics_5240.html 20

INTEREST OF AMICUS CURIAE

Heartland Alliance's **National Immigrant Justice Center** (NIJC) is a non-profit organization headquartered in Chicago, Illinois. NIJC has been accredited by the Board of Immigration Appeals ("BIA") since 1980. NIJC provides education and representation to low-income immigrants, asylum seekers, and refugees, including survivors of domestic violence, victims of crimes, detained immigrant adults and children, and victims of human trafficking, as well as immigrant families and other non-citizens facing removal and family separation. In 2010, though its staff attorneys and its network of over 1000 *pro bono* attorneys, NIJC provided legal services to more than 10,000 non-citizens.

NIJC promotes respect for human rights and access to justice for immigrants, refugees, and asylum seekers through policy advocacy, impact litigation, and public education. NIJC has a deep interest in the fairness of the BIA review process, as well as in protecting the opportunity of noncitizens like the Petitioners to seek discretionary relief from removal.

SUMMARY OF THE ARGUMENT

Lurking below the prominently argued questions of statutory interpretation in this case are complicated questions of how deference to the Board of Immigration Appeals ("Board") ought to function.

The Ninth Circuit analyzed the question below under the familiar *Chevron* test, as elaborated on by this Court's decision in *National Cable & Telecommunications Associations* v. *Brand X Internet Services*, 545 U.S. 967 (2005). See *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842–43 (1984). However,

this aspect of the lower court's approach was erroneous. The published Board decisions which the lower court analyzed under *Chevron* engaged in a straightforward "plain language" analysis of § 1229b(a) (1) and (2). Under this Court's decision in *Negusie* v. *Holder*, 555 U.S. 511, 523 (2009), agency decisions are not entitled to *Chevron* deference where they erroneously reach a plain meaning statutory interpretation and a court finds the statutory text ambiguous. The Board has not purported to choose one interpretation over other plausible choices; indeed, the Board's previous case law provides some reason to believe that it might adopt the imputation rule urged by Respondents. As the BIA offered no rationale for the result other than a plain language reading, the Court's case law calls for remand if the Court finds the statutory provisions ambiguous.

If the Court were to find that the Board's precedential decision-making qualified for *Chevron* deference, it would then confront a novel circumstance of an administrative law court purporting to overturn an Article III court under the authority of *Brand X*. *Amicus* submits that *Brand X* is particularly problematic as to administrative law bodies such as the Board. While *Brand X* deference always entails some separation of powers questions, those tensions are heightened in the immigration context, where the executive has a role distinct from the legislative, and where the Constitution places immigration matters squarely in the hands of Congress. Worse, the institutional integrity of the federal court system is implicated when the power to overrule Article III courts is given to administrative law judges. Amicus would urge against *Brand X* deference for agencies such as the Board.

To the extent that the Court concludes that *Brand X* necessarily follows from *Chevron* deference to the Board, the Court should revisit whether *Chevron* deference is appropriate as to the Board of Immigration Appeals in the first place. The Board occupies an unusual role within the administrative law world. It does not operate openly; it maintains no public docket, rarely invites outside participation before issuing precedential decisions, and does not even make its rare oral arguments publicly known. It operates in a dual-enforcement context wherein it possesses no rulemaking authority of its own, does not itself enforce the immigration laws, and possesses no authority to overrule regulations promulgated by other related agencies. It suffers from a lack of resources which has led to a slew of poorly reasoned published and unpublished decisions. It decides nearly 40,000 cases per year, selecting approximately 0.1% of those cases for publication. Its criteria for publication are not publicly revealed. It is often called upon to interpret provisions of the Immigration and Nationality Act which the federal courts are simultaneously forced to interpret in the criminal context. If the Court were to revisit the propriety of the appropriate style of deference to the Board, Amicus submits that the *Chevron* framework would be inappropriate.

ARGUMENT

I. SHOULD THE COURT FIND THE STATUTORY LANGUAGE AMBIGUOUS, A REMAND IS NECESSARY BECAUSE BIA HAS NOT SET FORTH A RATIONALE THAT WOULD INVOKE DEFERENCE

The parties urge that the statutes in question have a plain meaning under "step one" of *Chevron U.S.A.*

Inc. v. *NRDC*, 467 U.S. 837, 842–43 (1984), after application of traditional canons of construction. Cf. Br. for Pet'r, 33; Br. for Resp't, 37 (10-1543). The Board of Immigration Appeals also ruled on plain meaning grounds. When the Board found that a parent's period of residence cannot be imputed to a child for the purpose of satisfying the eligibility requirements contained in 8 U.S.C. § 1229b(a)(1) and (2), it did so based on the "clear language of the statute" and the "clear intent of Congress." *In re Escobar*, 24 I. & N. Dec. 231, 234 (2007) (interpreting § 1229b(a)(1)); see also *In re Ramirez-Vargas*, 24 I. & N. Dec. 599, 600 (BIA 2008) (relying on *Escobar* and interpreting § 1229b(a)(2)). The Board believed its interpretation was compelled by the statute's plain meaning, and conducted a typical step one analysis. See, *e.g.*, *In re Martinez*, 25 I. & N. Dec. 66, 74-75 (BIA 2009) ("In ascertaining the plain meaning of a statute, we consider the particular statutory language at issue, its context, and the language and design of the statute as a whole."

If the Court reaches the question of deference under *Chevron*, it will have already determined that the statute is ambiguous—that it lacks a plain meaning. See *Chevron*, 467 U.S. at 842–43 (instructing courts to defer to reasonable agency interpretations only when the intent of Congress is not clear or unambiguous). Thus, in order for the Court to reach the second "step" of *Chevron*, it must implicitly recognize that the stated basis for the Board's ruling in *Ramirez-Vargas* was erroneous.

It is no answer to say that the Board's "refusal" to read imputation into the statute would have been reasonable under *Chevron* if the Board *had* attempted to construe an ambiguous statute. Cf. Br. or Pet'r at 34. The Board did not simply decline to

exercise its discretion to read imputation into the statute; instead, the Board believed it lacked such discretion in the first instance.

Even if the Board's interpretation would have been permissible had it found the statute to be ambiguous, it is a "simple but fundamental rule of administrative law" that courts can "judge the propriety" of agency action "solely by the grounds invoked by the agency." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947). Application of this administrative law rule is particularly sensible here, where the Board's case law gives some reason to believe that the agency might permit imputation from parent to child if it believed that the statutory text could support that approach. See, *e.g.*, *In re Ng*, 12 I. & N. Dec. 411, 412 (BIA 1967); *In re A.*, 4 I. & N. Dec. 723, 725 (BIA 1952); cf. *In re Aurelio*, 19 I. & N. Dec. 458 (BIA 1987) (imputing intent of parents to child).

Amicus understands the Court to have adopted a rule that "deference to an agency's interpretation of a statute is not appropriate when the agency wrongly believes that interpretation is compelled by Congress." *Peter Pan Bus Lines, Inc.* v. *Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 (D.C. Cir. 2006) (citations and internal quotation marks omitted). In *Negusie* v. *Holder*, 555 U.S. 511, 523 (2009), the Court quoted with approval the holding in *Cajun Elec. Power Coop., Inc.* v. *F.E.R.C.*, 924 F.2d 1132, 1136 (D.C. Cir. 1991) (opinion by Silberman, J., joined by R. Ginsburg and Thomas, JJ.), that "if an agency erroneously contends that Congress' intent has been clearly expressed and has rested on that ground, we remand to require the agency to consider the question afresh in light of the ambiguity we see." The *Negusie* Court quoted that language for the proposition that deciding a matter unaddressed by

the Board of Immigration Appeals would be "in tension with" the ordinary remand rule. 555 U.S. at 523. As that proposition was the basis for the Court's decision, cf *id.* at 534 n.5 (Stevens, J., concurring in part and dissenting in part), it constitutes part of the holding of that case.

Thus, to the extent that the Court finds it necessary to reach step two of *Chevron*, *Negusie* requires application of the "ordinary remand rule" so that to the Board may exercise its discretion in the first instance. 555 U.S. at 523 ("Having concluded that the BIA has not yet exercised its *Chevron* discretion to interpret the statute in question, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." (citations and internal quotation marks omitted)); see also *INS* v. *Orlando Ventura*, 537 U.S. 12, 17 (2002) (*per curiam*) (explaining that the ordinary remand rule applies where an agency "can bring its expertise to bear upon the matter; it can evaluate the evidence; it can make an initial determination; and, in doing so, it can, through informed discussion and analysis, help a court later determine whether its decision exceeds the leeway that the law provides").

If the Court finds the statutory texts at issue herein to lack a plain meaning, the Court would then confront the issue of the Board's authority under Brand X. While the Court need not resolve the question today, it will likely arise on remand, and the Court may find it prudent to provide some guidance to the lower courts on this point.

II. THE COURT OUGHT TO HESITATE BEFORE APPLYING *BRAND X* TO THE BOARD OF IMMIGRATION APPEALS

The Court's decision in *National Cable & Telecommunications Association* v. *Brand X Internet Services*, 545 U.S. 967 (2005), appears to permit agencies to overturn or reject statutory interpretations adopted by the federal courts, when the agencies issue decisions which carry the force of law. *See id.* at 1017 (Scalia, dissenting). Indeed, the Board has so interpreted *Brand X*, having cited it in dozens of cases, and employed it in published[1] and unpublished cases[2] to reject federal court decisions in cases arising within those circuits.

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[1] *In re Armendarez-Mendez*, 24 I. & N. Dec. 646, 653 (BIA 2008) (rejecting *Lin* v. *Gonzales*, 473 F.3d 979 (9th Cir. 2007) within the Ninth Circuit); *In re Silva-Trevino*, 24 I. & N. Dec. 687 (BIA 2008) (overturning 50 decades of BIA jurisprudence and case law of ten circuits); *In re Diaz and Lopez*, 25 I. & N. Dec. 188 (BIA 2010) (rejecting *Acosta* v. *Gonzales*, 439 F.3d 550 (9th Cir. 2006) within Ninth Circuit); *In re Guevara Alfaro*, 25 I. & N. Dec. 417 (BIA 2011) (rejecting *Quintero-Salazar* v. *Keisler*, 506 F.3d 688 (9th Cir. 2007) under authority of *Silva-Trevino*, notwithstanding intervening circuit authority from Eighth and Third Circuits rejecting the analysis in that decision); *In re Saiful Islam*, 25 I. & N. Dec. 637 (BIA 2011) (refusing to apply *Nason* v. *INS*, 394 F.2d 223 (2d Cir. 1968) within the Second Circuit).

[2] *See In re Benito Estrada*, File: A092 408 863, 2008 WL 5025206 (BIA Oct. 27, 2008) (unpublished) (rejecting *Lin* v. *Gonzales*, *supra*, within Ninth Circuit); *In re Juan Manuel Alvarez-Briseno*, File: A021 611 209, 2009 WL 773178 (BIA Feb. 27, 2009) (unpublished) (same); *In re Jesus Haro-Perez a.k.a. Jesus Jose Harro*, File: A092 515 273, 2009 WL 2171613 (BIA July 9, 2009) (unpublished) (same); *In re Ruben Dario Sanchez Esquivel a.k.a. Ruben Dario Sanchez-Equivel a.k.a. Ruben Dario*, File: A035 727 884, 2009 WL 3250485 (BIA Sept. 18, 2009) (unpublished) (same); *In re Gilberto Salgado-Valenzuela*,

Further, the agency has openly adopted a policy of employing *Brand X* widely, in order to assert executive authority:

> The Supreme Court's decision in Brand X Internet offers **an important opportunity** for the Attorney General and the Board to be able to reclaim Chevron deference with respect to the interpretation of ambiguous statutory provisions in the immigration laws, notwithstanding contrary judicial interpretations.

Board of Immigration Appeals: *Affirmance Without Opinion, Referral for Panel Review, and Publication of Decisions as Precedents,* 73 Fed. Reg. 34,654, 34,661 (June 18, 2008) (emphasis added) (cited with approval in *In re R-A-*, 24 I. & N. Dec. 629 (BIA 2008).

File: A041 392 297, 2009 WL 4030445 (BIA Nov. 10, 2009) (unpublished) (same); *In re: Aik Wong a.k.a. Bingqin Wang*, File: A098 270 087, 2010 WL 3027539 (BIA July 2, 2010) (unpublished) (same, notwithstanding intervening decision in *Coyt* v. *Holder*, 593 F.3d 902 (9th Cir. 2010), which the Board found inapplicable); *In re Oscar Padilla*, File: A073 868 045, 2008 WL 5477687 (BIA Dec. 8, 2008) (unpublished) (rejecting *Cuevas-Gaspar* v. *Gonzales*, 430 F.3d 1013 (9th Cir. 2005) within Ninth Circuit); *In re Karina J. Alvarez-Fernandez a.k.a. Karina J. Alvarez*, File: A046 941 394, 2009 WL 638928 (BIA Feb. 24, 2009) (unpublished) (applying *Silva-Trevino* within 11th Cir.); *In re Agustin Gandai Ajavon*, File: A028 202 026, 2009 WL 1799957 (BIA May 29, 2009) (unpublished) (applying *Silva-Trevino* within Third Circuit, notwithstanding *Mehboob* v. *Att'y Gen.*, 549 F.3d 272 (3d Cir. 2008)); *In re Jorge Alberto Mora-Saucedo a.k.a. George Albert Saucedo a.k.a. Georget A. Saucedo a.k.a. George Alberto Mora-Saucedo*, File: A305 933 369, 2010 WL 1607035 (BIA March 29, 2010) (unpublished) (applying *Silva-Trevino* within Ninth Circuit notwithstanding *Marmolejo-Campos* v. *Holder*, 558 F.3d 903, 910 (9th Cir. 2009)).

The unpublished Board decision in *Sawyers*, below, File: A44 852 478, 2007 WL 4711443 (BIA Dec. 26, 2007), appears to be the first decision in which Board employed *Brand X* to reject a federal court decision for a case arising within that circuit.

The impact of this new, muscular policy has been significant. When the Board rejects heretofore binding circuit authority, it leads to increased federal court litigation. For instance, in *In re Armendarez-Mendez*, 24 I. & N. Dec. 646, 653 (BIA 2008), the Board declined to apply *Lin* v. *Gonzales*, 473 F.3d 979 (9th Cir. 2007) within the Ninth Circuit. The Board's interpretation of its regulations was rejected in court after court,[3] but the developing weight of contrary authority left the Board unconvinced.[4] The Ninth Circuit ultimately rejected the Board's position again, *Reyes–Torres* v. *Holder*, 645 F.3d 1073, 1077 (9th Cir. 2011), but not before the Board had disclaimed authority to reopen proceedings in numerous unpublished decisions.[5] The Westlaw database is not

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[3] *William* v. *Gonzales*, 499 F.3d 329, 332 (4th Cir. 2007); *Marin–Rodriguez* v. *Holder*, 612 F.3d 591, 594–95 (7th Cir. 2010); *Coyt*, 593 F.3d 902; *Pruidze* v. *Holder*, 632 F.3d 234, 237–38 (6th Cir. 2011); *Luna* v. *Holder*, 637 F.3d 85 (2d Cir. 2011); *Reyes–Torres* v. *Holder*, 645 F.3d 1073, 1077 (9th Cir.2011); *Prestol Espinal* v. *Att'y Gen.*, 653 F.3d 213 (3d Cir. 2011).

[4] *See In re: Aik Wong a.k.a. Bingqin Wang*, 2010 WL 3027539 (unpublished) (finding the Ninth Circuit's intervening authority in *Coyt*, 593 F.3d 902 to be distinguishable).

[5] *See In re Benito Estrada*, 2008 WL 5025206 (unpublished); *In re Juan Manuel Alvarez-Briseno*, 2009 WL 773178 (unpublished) (same); *In re Jesus Haro-Perez a.k.a. Jesus Jose Harro*, 2009 WL 2171613 (unpublished) (same); *In re Ruben Dario Sanchez Esquivel a.k.a. Ruben Dario Sanchez-Equivel a.k.a. Ruben Dario*, 2009 WL 3250485 (unpublished) (same); *In re Gilberto Salgado-Valenzuela*, 2009 WL 4030445

a comprehensive list of Board decisions; and it is unknown how many people were prejudiced by the Board's approach. Many noncitizens are financially unable to engage in the appellate litigation which would be necessary to vindicate the precedent of the court of appeals.

The point is not that the Board is invariably wrong when it disagrees with a Court of Appeals' interpretation; but that the Board's expansive view of *Brand X* has consequences for the federal court system. To take another example, in *Silva-Trevino*, the Attorney General overturned established case law in every circuit except for the Seventh Circuit. See *In re Velazquez-Herrera*, 24 I. & N. Dec. 503, 513 (BIA 2008). Therefore, under *Brand X*, the Board applied *Silva-Trevino* within the Third Circuit, *see In re Agustin Gandai Ajavon*, 2009 WL 1799957 (unpublished), even after post-*Silva-Trevino* circuit precedent adhered to the categorical approach. *Mehboob* v. *Att'y Gen.*, 549 F.3d 272 (3d Cir. 2008). The Board's stance required the Third Circuit to re-re-affirm its adherence to the categorical test for ascertaining moral turpitude. *Jean-Louis* v. *Att'y Gen.*, 582 F.3d 462 (3d Cir. 2009); accord, *Guardado-Garcia* v. *Holder*, 615 F.3d 900, 902 (8th Cir. 2010) (adhering to categorical test); *Fajardo* v. *U.S. Atty. Gen.*, 659 F.3d 1303, 1310-11 (11th Cir. 2011) (same, finding *Silva-Trevino* contrary to Congressional intent). It is the nature of *Brand X* in this context to lead to re-litigation of issues seemingly resolved at the Court of Appeals level.

The Board basically shares Justice Scalia's understanding of *Brand X* that "[e]ven when the

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(unpublished) (same); *In re Aik Wong a.k.a. Bingqin Wang*, 2010 WL 3027539 (unpublished).

agency itself is party to the case in which [a] Court construes a statute, the agency will be able to disregard that construction and seek Chevron deference for its contrary construction the next time around." *Brand X*, 545 U.S. at 1017.

Aside from the constitutional issues noted in the *Brand X* dissent, *see id.* (citing *Chicago & Southern Air Lines, Inc.* v. *Waterman S.S. Corp.*, 333 U.S. 103, 112-13 (1948)), the approach has particular significance in the immigration context. The constitution gives Congress a leading role in regulating immigration within the United States, U.S. Const. art. I, § 8, cl. 4, see, *e.g.*, *Hines* v. *Davidowitz*, 312 U.S. 52, 69-70 (1941), but immigration may also implicate national sovereignty, international relations, and defense powers. See, *e.g.*, *Kleindienst* v. *Mandel*, 408 U.S. 753, 765 (1972) (citing *Fong Yue Ting* v. *United States*, 149 U.S. 698 (1893). Permitting executive agencies power to reject the "best interpretation" *Brand X*, 545 U.S. at 983 (Scalia, J, dissenting), of a Congressional statute allows the executive to expand its authority at the expense of Congress. *Brand X* thus threatens the delicate balance between the Congress and the Executive as well as relations between the Judiciaru and the Executive.

At a practical level, application of *Brand X* in this context would allow administrative law judges to effectively overrule courts which have reversed them. The Court need not be blind to the odd psychology this would involve; surely no judge likes being reversed. See, *e.g.*, Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 Tex. L. Rev. 1, 77-78 (1994) (discussing reasons why district court judges dislike being reversed on appeal); Richard A. Posner, *The*

Problems of Jurisprudence 224 (1990) ("[M]ost judges are highly sensitive to being reversed"). As understood by the agency, *Brand X* permits an administrative law board whose decision has been reversed (as to an ambiguous statute) to overturn the reversal by the issuance of a new precedential decision. This creates at best an untoward appearance. Justice Scalia noted this in *Brand X*, see 545 U.S. at 1016-17 (Scalia, J., dissenting), but the administration action in that case was a highly technical administrative rulemaking, *id.* at 977-78, not in the context of administrative judicial bodies overruling Article III courts. Whatever the wisdom of *Brand X* in heartland areas of administrative action, it has a different mien applied to administrative law bodies.

Unless an agency actually undertakes to overrule a decision of this Court, the *Brand X* issue will be resistant to the Court's review. As in any agency case that comes before the Court, this Court is not bound by the lower court interpretation. *Id.* at 1019-20 (Scalia, dissenting). (This is presumably why the parties have declined to address the *Brand X* issue at any length.) In any agency case that comes to the Court, it will analyze the agency action under the *Chevron* test, and *Brand X* issues would become irrelevant by virtue of the grant of certiorari. The institutional significance of *Brand X* will persist; and this Court's legal interventions must necessarily remain infrequent in comparison to the larger federal docket.

Amicus sees three possibilities: (a) the agency's approach is correct, and the BIA may overrule Article III courts by issuing precedential decisions; (b) the decision in *Brand X* may be interpreted not to apply to quasi-judicial bodies like the BIA (or to the BIA

only, as *sui generis*); or (c) the Court may revisit whether to grant *Chevron* deference to the Board.

III. A SUBSTANTIAL QUESTION EXISTS AS TO WHETHER BIA'S ADJUDICATORY DECISIONS WARRANT *CHEVRON* DEFERENCE

The Board's peculiar administrative work does not fit any of the rationales that underlie *Chevron*'s strong deference to agency rulemaking and expertise. Should the Court find *Chevron* deference implicated by this case, *Amicus* urges the Court to rule that *Chevron* deference should not apply to BIA decisions. Given the poor fit between the Board's activities and *Chevron*'s reasoning, only so-called "*Skidmore* deference" should be accorded to the Board's juridical decisions. See *United States* v. *Mead Corp.*, 533 U.S. 218, 239 (2001) (quoting *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 139 (1944)).

A. The BIA Generally Makes Rules With No Input From the Public or From Stakeholders.

Unlike federal administrative agencies acting through public rulemaking, cf., *e.g.*, Dep't of Homeland Sec., Statement of Regulatory Priorities, 75 Fed. Reg. 79536-01, 2010 WL 5677733 (Dec. 20, 2010), the Board of Immigration Appeals maintains no public docket. Nothing on its website, or in any other publication, indicates any case or issue which is under consideration for potential publication of a precedential decision. Cf. Executive Office of Immigration Review, http://www.justice.gov/eoir (last visited Dec. 20, 2011).

Even oral argument at the Board is not announced publicly. Cf. Executive Office of Immigration Review, News and Information,

http://www.justice.gov/eoir/press/newsinfo.htm (last visited Dec. 20, 2011) (public statements by EOIR during 2010 and 2011, including no mention of oral argument in any case). Oral argument, at any rate, is quite rare. Since 2008, the Board appears to have scheduled oral argument in only four cases. *In re Bautista*, 25 I. & N. Dec. 616 (BIA 2011); *In re Ramon Roberto Huerta-Flores a.k.a. Roberto Huerta*, File: A092 444 014, 2010 WL 5808899 (BIA Aug. 27, 2010) (unpublished); *In re Castillo-Padilla*, 25 I. & N. Dec. 257 (BIA 2010); *In re Marcal Neto*, 25 I. & N. Dec. 169, 171 (BIA 2010) (argument cancelled due to inability of counsel to be present). During that four year period, the Board and Attorney General issued 141 precedential decisions, and the Board decided at least 104,976 cases. U.S. Dep't of Justice, FY10 Statistical Year Book, at S1 (Jan. 2011), *available at* http://www.justice.gov/eoir/statspub/fy10syb.pdf (numbers are for fiscal years 2008-2010, the last year for which statistics are available). That is, oral argument occurred in 2.1% of the published decisions and in less than .001% of unpublished decisions.

From 2008 to the present, *amicus curiae* have appeared in 11 of the Board's published decisions (less than 10%). Three of those cases involved the overruling of earlier BIA decisions which had been previously decided without amicus involvement,[6] perhaps suggesting the utility of public involvement. This level of amicus involvement is actually substantially higher than the historical norm. From

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[6] *In re Marcal Neto*, 25 I. & N. Dec. 169 (overruling *In re Perez Vargas*, 23 I. & N. Dec. 829 (BIA 2005)); *In re Garcia Arreola*, 25 I. & N. Dec. 267 (BIA 2010) (overruling *In re Saysana*, 24 I. & N. Dec. 602 (BIA 2008)); *In re Alyajzi*, 25 I. & N. Dec. 397 (BIA 2011) (overruling in part *In re Shanu*, 23 I. & N. Dec. 754 (BIA 2005)).

2002-2006 (during which period 88 precedential decisions were issued), *amicus curiae* were involved in only three published decisions (3.4% of the total). *In re Assaad*, 23 I. & N. Dec. 553 (BIA 2003); *In re Smirko*, 23 I. & N. Dec. 836 (BIA 2005); *In re S-K-*, 23 I. & N. Dec. 936 (BIA 2006). Indeed, during that period, the Board issued as many published decisions in cases involving *pro se* noncitizens[7] as in cases involving *amicus curiae*. *In re Y-C-*, 23 I. & N. Dec. 286 (BIA 2003) (asylum application by unaccompanied minor); *In re Gomez-Gomez*, 23 I. & N. Dec. 522 (BIA 2002) (finding removability of 8 year old respondent established by clear and convincing evidence and remanding for *in absentia* removal order); *In re Mejia-Andino*, 23 I. & N. Dec. 533 (BIA 2002) (concerning propriety of service on minor respondent 7 years of age). In none of the *pro se* published cases – all involving minor respondents – did the Board solicit amicus briefing or appoint counsel.

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[7] In 2003, 48 percent of aliens were unrepresented in proceedings before Immigration Judges. Executive Official for Immigration Review, U.S. Dep't of Justice, FY 2007 Statistical Yearbook G1, fig. 9. (2008), *available at* http://www.usdoj.gov/eoir/statspub/fy07syb.pdf. By 2006, that number had decreased to 35 percent; it rose again to 42 percent in 2007. *Id.* The percentage of aliens who were unrepresented in their proceedings before the BIA itself fluctuated between 25 percent in 2007 and 22 percent in 2008. *Id.*; Executive Official for Immigration Review, U.S. Dep't of Justice, FY 2007 Statistical Yearbook G1, fig. 9, W1, fig. 30 (2008), http://www.usdoj.gov/eoir/statspub/fy07syb.pdf. Noncitizens before the BIA are not considered eligible for appointed counsel. *See In re Compean*, 24 I. & N. Dec. 710, 714 (BIA 2009), *rev'd*, 25 I & N. Dec. 1 (BIA 2009); *cf. Aguilera-Enriquez* v. *INS*, 516 F.2d 565, 570 (6th Cir. 1975) (finding appointed counsel required by Fifth Amendment in limited cases).

Indeed, even in counseled cases, the issues under consideration are often opaque. For instance, in *Silva-Trevino*, former Attorney General Mukasey certified a BIA decision to himself, and then issued a decision which overturned 50 years of BIA case law, as well as case law in nearly every circuit in the country. See *In re Velazquez-Herrera*, 24 I. & N. Dec. at 513 ("For nearly a century, the Federal circuit courts of appeals have held that ... the focus ... must be on the crime of which the alien was *convicted*, to the exclusion of any other criminal or morally reprehensible acts he may have *committed*." (emphasis in original)). The attorney for Mr. Silva-Trevino was not even advised that the case had been certified to the Attorney General until months after the certification. Br. for Pet'r 4-5, *Silva-Trevino* v. *Holder* (5th Cir.) (11-60464) (on file with counsel) (record contains emails to Immigration Court certifying case in April 2007, but notice not sent to counsel until August 2007). Counsel for Silva-Trevino was not permitted to submit briefing, or even told of the issues being considered by the Attorney General. *Jean-Louis*, 582 F.3d at 471 n.11 ("the Attorney General refused to identify the issues to be considered, to define the scope of his review, to provide a briefing schedule, or to apprise counsel of the applicable briefing procedure. In fact, neither the IJ decision nor the Attorney General's certification order were made publicly available, thus denying stakeholders, including immigrant and refugee advocacy organizations, the opportunity to register their views.").

Granted, *amicus* briefs are only one way for the public to be involved in a case, and are uncommon even at the Courts of Appeals. *Amicus* is not arguing here that agencies must issue statements to parties

or potential amici of issues under consideration. But without some means of permitting public input, such input cannot reasonably be expected. The result is that the precedent-setting rules of the Board and Attorney General are as far from traditional notice and comment rulemaking or public agency hearings as can be imagined. Cf. *Mead Corp.*, 533 U.S. at 230 ("fairness and deliberation ... should underlie a pronouncement [having the force of law]").

B. The BIA Has Comparatively Limited Subject Matter Expertise.

Although the subject matter jurisdiction of the BIA is limited,[8] its adjudicatory nature gives it little advantage over Article III courts, and the split enforcement structure also undercuts any claim for deference.

The DHS and BIA are distinct administrative bodies that implement immigration policy in a split-enforcement structure.[9] The BIA is located within the Department of Justice's Executive Office for Immigration Review (EOIR), where immigration judges adjudicate removal cases.[10] In this split-

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[8] *See* Organization, Jurisdiction, and Powers of the Board of Immigration Appeals, 8 C.F.R. § 1003.1(b) (2009) (setting forth the limited nature of the BIA's subject matter jurisdiction).

[9] *See generally* George Robert Johnson, Jr., *The Split-Enforcement Model: Some Conclusions from the OSHA and MSHA Experiences*, 39 Admin. L. Rev. 315, 317-319 (1987).

[10] Enforcement by the DHS and BIA differs slightly from typical split-enforcement agency structures because the Secretary of Homeland Security and the Chairman (or a majority of the Board) may refer cases to the Attorney General, or the Attorney General May direct the BIA to refer cases. 8 C.F.R. § 1003.1(h) (2007). *See* Margaret H. Taylor, *Refugee Roulette in an Administrative Law Context: The Deja vu of*

enforcement structure, the DHS enforces and administers the law while the BIA adjudicates. This is not unique to immigration law. Cf., *e.g.*, Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–678; Federal Mine Safety and Health Amendments Act of 1977, 30 U.S.C. § 823; Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731.

The split enforcement structure militates against giving the Board full *Chevron* deference. In *Martin* v. *Occupational Safety & Health Rev. Comm'n*, (499 U.S. 144 (1991)), the Court held that in a split enforcement structure, the rulemaking enforcement agency had "readily identifiable structural advantages" over the adjudicatory agency. *Id.* at 152.[11] For instance, the Court found the enforcement agency better able to "reconstruct the purpose of the regulations in question," because it promulgated those regulations. *Id.*

The Board adjudicates with regard to a wide variety of matters. For instance, the Board interprets the aggravated felony definition at 8 U.S.C. § 1101(a)(43). See, *e.g.*, *In re Puente*, 22 I. & N. Dec. 1006 (BIA 1999), *rev'd*, *In re Ramos*, 23 I. & N. Dec. 336 (BIA 2002). So do District Courts throughout the country, because it is relevant to sentencing of individuals convicted of Illegal Reentry under 8 U.S.C. § 1326, U.S. Sentencing Guidelines Manual § 2L1.2(b)(1)(C) (2010); those decisions may be directly appealed to the Courts of Appeals. See, *e.g.*, *United States* v. *Chapa-Garza*, 243 F.3d 921, 926 (5th Cir.

Decisional Disparities in Agency Adjudication, 60 Stan. L. Rev. 475, 484 (2007).

[11] The Court in *Martin* presumed "that Congress intended to invest interpretive power in the administrative actor in the best position to develop these attributes." *Martin*, 499 U.S. at 152.

2001). Illegal Reentry is one of the most common convictions in the federal criminal system, accounting for thousands of convictions annually. TRAC Immigration, Illegal Reentry Becomes Top Federal Charge (June 10, 2011), http://trac.syr.edu/immigration/reports/251/. The Board appears to have no structural advantage over the federal courts in interpreting the aggravated felony statute. Yet the aggravated felony definition is within the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43), and some circuits have granted deference to Board interpretations of those provisions, see, *e.g.*, *Restrepo* v. *Att'y Gen. of U.S.*, 617 F.3d 787 (3d Cir. 2010), decisions which thereafter define the scope of federal criminal sentences. See *United States* v. *Ascencion-Carrera*, 413 F. App'x 549 (3d Cir. 2011) (applying Restrepo's holding on sentencing appeal).

The Board adjudicates asylum applications; so does USCIS's Asylum Office, a specialized group of adjudicators trained specifically in the handling of asylum cases and as to techniques for interviewing asylum claimants. Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 Stan. L. Rev. 295, 311, 381 (2007) ("[E]very new asylum officer completes an intensive five-week basic training course with testing. Each week, every regional office conducts four hours of training on new legal issues, country conditions, procedures, and other relevant matters.... [A]sylum officers currently receive much more initial and ongoing training than the immigration judges.").

The Board makes decisions regarding admissibility under 8 U.S.C. § 1182, in the course of adjudicating Adjustment of Status applications. See, *e.g.*, *In re*

Lemus-Losa, 24 I. & N. Dec. 373 (BIA 2007). The precise number of Adjustment cases adjudicated by the Board is not publicly available, but in FY2010, the Immigration Courts (of whose decisions a limited number are appealed to the Board) granted 8,475 applications for Adjustment of Status. U.S. Dep't of Justice, FY10 Statistical Year Book, at R3 (Jan. 2011), *available at* http://www.justice.gov/eoir/statspub/fy10syb.pdf. By contrast, USCIS approved over 550,000 applications for Adjustment of Status and adjudicated more than 35,000 applications for waivers of inadmissibility.[12] The Secretary of State adjudicated 6.5 million visas in fiscal year 2010.[13] These numbers dwarf the numbers of cases handled by the Board.

The Board's powers vis-à-vis regulations also highlights the Board's limited role. The Board of Immigration Appeals does not itself issue regulations, but rather, considers itself to be bound by regulations. *In re Moreno-Escobosa*, 25 I. & N. Dec. 114 (BIA 2009); *In re Ponce De Leon*, 21 I. & N. Dec. 154, 158 (BIA 1996) ("A regulation ... has the force

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[12] *See* Randall Monger and James Yankay, Annual Flow Report, March 2011: U.S. Legal Permanent Residents: 2010, at 2, *available at* http://www.dhs.gov/xlibrary/assets/statistics/publications/lpr_fr_2010.pdf; U.S. Dep't of Homeland Sec., Office of Citizenship and Immigration Services Ombudsman, Waivers of Inadmissibility: Additional Improvements Needed to Enhance the Current Filing Process and Minimize Reluctance to File at 8, Table D (June 10, 2010), *available at* http://www.dhs.gov/xlibrary/assets/cisomb_waivers_of_inadmissibility_recommendation.pdf.

[13] *See* U.S. State Dep't, Report of the Visa Office 2010, Table I, Immigrant and Nonimmigrant Visas Issued at Foreign Service Posts Fiscal Years 2006-2010, *available at* http://www.travel.state.gov/visa/statistics/statistics_5240.html.

and effect of law as to this Board and Immigration Judges."). Regulations may be promulgated by the Attorney General or by sister agencies. See, *e.g.*, 8 C.F.R. § 103.7(b)(1) (setting application fees for *inter alia*, applications for Adjustment of Status).

In short, Congress has given the Attorney General controlling authority over the interpretation of the immigration laws, 8 U.S.C. § 1103(a)(1), but the Board exercises that authority on the basis of subject matter expertise which is not unique or particularly extensive. The current structural nature of the Board would support a more limited form of deference than *Chevron* deference.

C. The BIA Lacks the Resources to Adequately Provide Legal Guidance on Issues Affecting Thousands.

Immigration law is often said to be "second only to the Internal Revenue Code in complexity." *Baltazar-Alcazar* v. *INS*, 386 F.3d 940, 948 (9th Cir. 2004). Yet the resources given the Board are incommensurate with its responsibility to interpret those provisions, particularly given their import to many millions of individuals.

For example, in 2007, the Board's eleven members completed 35,393 appeals, amounting to approximately 136 appellate decisions—over 12 per member—per workday.[14] In 2008, the number of appeals increased by over eight percent, to 38,369. *Id.* Even if the Board had the maximum number of members allowed at the time (fifteen), each member

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[14] *See* Darren H. Weiss, Comment, *X Misses the Spot: Fernandez v. Keisler and the (Mis)appropriation of Brand X by the Board of Immigration Appeals*, 17 Geo. Mason L. Rev. 889, 917–18 (2010) (citing BIA sources).

would have been responsible for authoring over ten appeal decisions *per day*. *Id.*; Cf. *Mead Corp.*, 533 U.S. at 233 ("Any suggestion that rulings intended to have the force of law are being churned out at a rate of 10,000 a year at an agency's 46 scattered offices is simply self-refuting.").

It is not surprising, when Board members can devote only between seven and ten minutes to each case, that the Board has repeatedly issued flawed decisions. See, *e.g.*, *Benslimane* v. *Gonzales*, 430 F.3d 828, 829 (7th Cir. 2005) (noting that in the year ending September 23, 2005, the Seventh Circuit "reversed the [BIA] in whole or part in a staggering 40 percent of the 136 petitions to review the Board that were resolved on the merits."). As Judge Posner has stated, the BIA's failures "can be understood, but not excused, as consequences of a crushing workload that the executive and legislative branches of the federal government have refused to alleviate." *Kadia* v. *Gonzales*, 501 F.3d 817, 821 (7th Cir.2007).

Examples of the BIA's failure to observe even "elementary principles of adjudication" litter the Federal Reporter. *Niam* v. *Ashcroft*, 354 F.3d 652, 654 (7th Cir. 2004) (listing erroneous BIA decisions from the Second, Seventh, Eighth, and Ninth Circuits); see, *e.g.*, *Sosnovskaia* v. *Gonzales*, 421 F.3d 589, 594 (7th Cir. 2005) ("the procedure that the [immigration judge] employed in this case is an affront to [petitioner's] right to be heard"); *Fiadjoe* v. *Att'y Gen.*, 411 F.3d 135, 154–55 (3d Cir. 2005) (the immigration judge's "hostile" and "extraordinarily abusive" conduct toward petitioner "by itself would require a rejection of his credibility finding"); *Lopez-Umanzor* v. *Gonzales*, 405 F.3d 1049, 1054 (9th Cir. 2005) ("the [immigration judge's] assessment of Petitioner's credibility was skewed by prejudgment,

personal speculation, bias, and conjecture"); *Wang* v. *Att'y Gen.*, 423 F.3d 260, 269 (3d Cir. 2005) ("the tone, the tenor, the disparagement, and the sarcasm of the [immigration judge] seem more appropriate to a court television show than a federal court proceeding"). It has made fatal mistakes when addressing facts. *E.g. Soumahoro* v. *Gonzales*, 415 F.3d 732, 738 (7th Cir. 2005) (per curiam) (the immigration judge's factual conclusion is "totally unsupported by the record"); *Ssali* v. *Gonzales*, 424 F.3d 556, 563 (7th Cir. 2005) (the immigration judge's "very significant mistake suggests that the Board was not aware of the most basic facts of [the petitioner's] case"); *Chen* v. *U.S. Dep't of Justice*, 426 F.3d 104, 115 (2d Cir. 2005) (the immigration judge's finding is "grounded solely on speculation and conjecture"). These decisions are illustrative of a much larger number of examples suggesting problems within the BIA.

The stakes in these cases are often of the highest order. The instant cases, not atypically, involve permanent exile from family, friends, longstanding residence, and employment. See *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922) (removal "may result . . . in loss of both property and life, or of all that makes life worth living"). Asylum cases involve stakes no less significant, as erroneous denial could lead to torture, persecution, or death. *Uanreroro* v. *Gonzales*, 443 F.3d 1197, 1208 (10th Cir. 2006). Judicial review over individual immigration case determinations is often severely restricted, see, *e.g.*, 8 U.S.C. §§ 1252(a)(2)(B), (a)(2)(C), leaving the courts unable to remedy injustices flowing from statutory misinterpretations. In this context, the importance of a fair reading of the laws can hardly be understated.

D. In *Aguirre-Aguirre*, the Court Was Not Presented With Arguments Against *Chevron* Deference, and That Decision Pre-Dates *Mead*.

When the Court decided *INS* v. *Aguirre-Aguirre*, 526 U.S. 415 (1999), the Court was not presented with any substantive arguments against application of the *Chevron* regime to the Board's decisions in immigration cases. Cf. Br. for the Resp't, No. 97-1754, 1999 WL 26721, at *29 (U.S. Jan. 21, 1999); Br. Amicus Curiae of the Lawyers Comm. for Human Rights in Support of the Resp't, No. 97-1754, 1999 WL 23657 (U.S. Jan. 21, 1999); Brief for Amicus Curiae in Support of the Resp't, No, 97-1754, 1999 WL 26718 (Jan. 21, 1999). The only arguments raised in that case were whether the lower court's analysis was consistent with Chevron. See Br. for the Resp't, 1999 WL 26721, at *29-30.

While the Court has described the application of Chevron as "well settled," *Negusie*, 555 U.S. at 516, *Aguirre-Aguirre* is of fairly recent vintage, and predates the Court's decision in *Mead Corp.*, 533 U.S. at 236. *Arobelidze* v. *Holder*, 653 F.3d 513, 520 (7th Cir. 2011). While several decisions of this Court have relied *Aguirre-Aguirre* and *Chevron*, the precise level of deference was rarely decisive. See, *e.g.*, *Judulang* v. *Holder*, No. 10-694, 2011 WL 6141311, at *7 n.7 (U.S. Dec. 12, 2011) (finding no effective difference between review under *Chevron* and under the Administrative Procedures Act). Reconsideration would be appropriate at some point; and this case may present an appropriate vehicle.

Adopting a lesser form of deference to the Board would not resolve the adjudicatory problems of the Board, but it would avoid the embarrassment to the system which would be entailed when the federal

courts may be overruled by an administrative law board, on the basis of hasty work, without public exposure, on the basis of limited expertise, and with gravely insufficient resources.

CONCLUSION

For the foregoing reasons, this Court should affirm the decisions of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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